— ARTICLE 33 —
DISCIPLINE

33.1 Applicability

The disciplinary procedure set forth in this Article shall be in lieu of the procedure specified in Sections 75 and 76 of the Civil Service Law and shall apply to all persons currently subject to Sections 75 and 76 of the Civil Service Law. In addition, it shall apply to those non-competitive class employees described in Section 75(1)(c) of the Civil Service Law who, since last entry into State service, have completed at least two years of continuous service in the non-competitive class, or who were appointed to a non-competitive class position as described in Section 75(1)(c) of the Civil Service Law on or after April 1, 1979, and have completed at least one year of continuous service in such position.

33.2 Purpose

The purpose of this Article is to provide a prompt, equitable and efficient procedure for the imposition of discipline for just cause. Both parties to this Agreement recognize the importance of counseling and the principle of corrective discipline. Prior to initiating formal disciplinary action pursuant to this Article, the appointing authority, or the authority's designee, is encouraged to resolve matters informally: provided, however, such informal action shall not be construed to be a part of the disciplinary procedure contained in this Article and shall not restrict the right of the appointing authority, or the designee, to consult with or otherwise counsel employees regarding their conduct or to initiate disciplinary action.

33.3 Employee Rights

(a) Employees may represent themselves or be accompanied for purposes of representation by PEF or an attorney, at meetings or hearings held pursuant to the disciplinary procedure set forth in Section 33.5, and when, as provided in subdivision (b) or (c) below, the employee is required to submit to an interrogation or requested to sign a statement. Unless the employee declines representation, a reasonable period of time shall be given to obtain a representative. If the employee requests representation and the employee or PEF fails to provide a representative within a reasonable period of time, the meetings or hearings under the disciplinary procedure may proceed, an interrogation as provided in subdivision (b) below may proceed, or, the employee may be requested to sign a statement as provided in subdivision (c) below. An arbitrator under this Article shall have the power to find that a delay in providing a representative may have been unreasonable. Where an employee elects to be represented by PEF exclusively, the PEF representative assigned by PEF, if a State employee, shall not suffer any loss of earnings or be required to charge leave credits for absence from work as a result of accompanying an employee for purposes of representation as provided in this subdivision.

(b) An "interrogation" shall be defined to mean the questioning of an employee who, at the time of the questioning, has been determined to be a likely subject for disciplinary action. The routine questioning of an employee by a supervisor or other representative of management to obtain factual information about an occurrence, incident or situation or the requirement that an employee submit an oral or written report describing an occurrence, incident or situation, shall not be considered an interrogation. If during the course of such routine questioning or review of such oral or written report, the questioner or reviewer determines that the employee is a likely subject for disciplinary action, the employee shall be so advised. An employee shall be required to submit to an interrogation by a department or agency (1) if the information sought is for use against such employee in a disciplinary proceeding pursuant to this Article, or (2) after a notice of discipline has been served on such employee, only if the employee has been notified, in

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advance of the interrogation, of the rights to representation as provided in subdivision (a) above. If an employee is improperly subjected to interrogation in violation of the provisions of this subdivision (b), no information obtained solely through such interrogation shall be used against the employee in any disciplinary action. No recording device shall be used nor shall any stenographic record be taken during an interrogation unless the employee is advised in advance that a record is being made. A copy of any formal record shall be supplied to the employee upon request.

(c) No employee who has been served with a notice of discipline pursuant to Section 33.5, or who has been determined to be a likely subject for disciplinary action, shall be requested to sign any statement regarding a matter which is the subject of a disciplinary action under Section 33.5 of this Article unless offered the right to have a representative of PEF or an attorney present and, if he or she requests such representation, is afforded a reasonable period of time to obtain a representative. A copy of any statement signed by an employee shall be supplied to him/her. Any statements signed by an employee without having been so supplied to him/her may not subsequently be used in a disciplinary proceeding.

(d) In all disciplinary proceedings under Section 33.5, the burden of proof that discipline is for just cause shall rest with the employer. Such burden of proof, even in serious matters which might constitute a crime, shall be preponderance of the evidence on the record and shall in no case be proof beyond a reasonable doubt.

(e) An employee shall not be coerced, intimidated or caused to suffer any reprisals, either directly or indirectly, that may adversely affect wages or working conditions as the result of the exercise of the rights under this Article.

33.4 Suspension or Temporary Reassignment Before Notice of Discipline

(a) Prior to the service of a notice of discipline or the completion of the disciplinary procedure set forth in Section 33.5, an employee may be suspended without pay or temporarily reassigned by the appointing authority, or the authority's designee, in his/her discretion, only pursuant to paragraphs (1) and (2) of this subdivision.

(1) The appointing authority or his/her designee may, in his/her discretion, suspend an employee without pay or temporarily reassign him/her when a determination is made that there is probable cause that such employee's continued presence on the job represents a potential danger to persons or property or would severely interfere with operations. A notice of discipline shall be served no later than five (5) calendar days following any such suspension or temporary reassignment.

(2) The appointing authority or his/her designee, in his/her discretion, may suspend without pay or temporarily reassign an employee charged with the commission of a crime. Within thirty (30) calendar days following a suspension under this paragraph, a notice of discipline shall be served on such employee or such employee shall be reinstated with back pay. Where the employee, who is charged with the commission of a crime is temporarily reassigned, the notice of discipline shall be served on such employee within seven (7) days after the disposition of the criminal charges as provided in the Criminal Procedure Law of the State of New York or the employee shall be returned to his/her regular assignment. Nothing in this paragraph shall limit the right of the appointing authority or his/her designee from taking disciplinary action while criminal proceedings are pending. Nothing in this paragraph shall preclude the application of the provisions in Article 33.4(b)(1).

(3) During the period of any suspension without pay pursuant to the provisions of this Section 33.4, the State shall continue the employee's and dependents' health insurance coverage that was in effect on the day prior to the first day of the suspension, and shall pay the employer's

share of any premium to maintain such coverage. Any such suspended employee shall be responsible for paying the employee's share of premium for such health insurance coverage. The State shall not be liable for payment of the employer's share of the health insurance premium for any period of time during which the suspended employee fails to pay the employee's share of the health insurance premium.

(4) In the case of any suspension without pay, the employee may be allowed to draw from accrued annual or personal leave credits, holiday leave or compensatory leave which shall be reinstated in the event that, in accordance with this Article, the suspension is deemed improper or the employee is found innocent of all allegations contained in the notice of discipline. The use of such credits shall be at the option of the employee. Such use of leave credits during suspension will not be available if the employee is offered a reassignment and declines.

(b) Temporary Reassignment

(1) Where the appointing authority has determined that an employee is to be temporarily reassigned pursuant to this Article, the employee shall be notified in writing of the location of such temporary reassignments and the fact that such reassignment may involve the performance of out-of-title work. The employee may elect in writing to refuse such temporary reassignment and be suspended without pay. Such election must be made in writing before the commencement of the temporary assignment. An election by the employee to be placed on a suspension without pay is final and may not thereafter be withdrawn. Once the employee commences the temporary assignment, no election is permitted.

(2) The fact that the State has temporarily reassigned an employee rather than suspending him/her without pay or the election by an employee to be suspended without pay rather than be temporarily reassigned shall not be considered by the disciplinary arbitrator for any purpose.

(3) Temporary reassignments under this Section shall not involve a change in the employee's rate of pay.

(c)(1) Suspensions without pay and temporary reassignments made pursuant to this Section shall be reviewable by a disciplinary arbitrator in accordance with provisions of Section 33.5 to determine whether the appointing authority had probable cause.

(2) Where an employee has been suspended without pay or temporarily reassigned he/she may, in writing, waive the agency or department level meeting at the time of filing a disciplinary grievance. In the event of such waiver, the employee shall file the grievance form within the prescribed time limits for filing a department or agency level grievance directly with the American Arbitration Association (AAA) in accordance with Section 33.5. The AAA shall give the case priority assignment and shall forthwith set the matter down for hearing to be held within 14 calendar days of the filing of the demand for arbitration. The time limits may not be extended.

(3) Where an employee is suspended without pay or temporarily reassigned, and the hearing will extend beyond one day, either party may authorize the arbitrator to issue an interim decision and award solely with respect to the issue of whether there was probable cause for the suspension or temporary reassignment, such request to be permitted at any time after the completion of the State's direct case.

(4) Within five (5) calendar days of any suspension without pay or temporary reassignment pursuant to this Section, the President of PEF or the President's designee shall be sent a notice advising him/her, in writing, of such suspension without pay or temporary reassignment. Such notice shall be sent by certified mail, return receipt requested.

(d) In the event of a failure to serve a notice of discipline within the time limits established in Section 33.4(a), the employee shall be deemed to have been suspended without pay as of the date of service of the notice of discipline or, in the event of a temporary reassignment, may return to his/her actual assignment until such notice is served. In the event of failure to notify the President of PEF or the President's designee of the suspension within the time period established in Section 33.4(c)(4), the employee shall be deemed to have been suspended without pay as of the date the notice is sent to the President of PEF or the President's designee.

33.5 Disciplinary Procedure

(a) Where the appointing authority or the authority's designee seeks to impose discipline, notice of such discipline shall be made in writing and served upon the employee. Discipline shall be imposed only for just cause. Disciplinary penalties may include a written reprimand, a fine not to exceed two weeks' pay, suspension without pay, demotion, restitution, dismissal from service, loss of leave credits or other privileges, or such other penalties as may be appropriate. The specific acts for which discipline is being imposed and the penalty or penalties proposed shall be specified in the notice. The notice shall contain a description of the alleged acts and conduct, including reference to dates, times and places. Two copies of the notice shall be served on the employee. Service of the notice of discipline shall be made by personal service or by certified mail, return receipt requested.

(b) The President of PEF or the President's designee shall be advised by certified mail, return receipt requested, of the name and work location of an employee against whom a notice of discipline has been served.

(c) The notice of discipline served on the employee shall be accompanied by a copy of this Article and a written statement1 that:

(1) the employee has a right to object by filing a disciplinary grievance within 14 calendar days;

(2) he/she has the right to have the disciplinary action reviewed by an independent arbitrator;

(3) the employee is entitled to be accompanied for the purposes of representation by PEF or an attorney at every step of the disciplinary proceeding;

(4) if a disciplinary grievance is filed, no penalty can be implemented unless the employee fails to follow the procedural requirements, or until the matter is settled, or until the arbitration procedure specified in subdivision (f) below, is completed.

(d) The penalty proposed by the appointing authority may not be implemented until (1) the employee fails to file a disciplinary grievance within 14 calendar days of the service of the notice of discipline, or (2) having filed a grievance, the employee fails to file a timely appeal as provided in subdivision (f) below or (3) the penalty is upheld or a different penalty is determined by the arbitrator to be appropriate, or (4) the matter is settled.

(e) If not settled or otherwise resolved, the notice of discipline may be the subject of a grievance before the department or agency head, or a designee, and shall be filed either in person or by certified mail, return receipt requested, by the employee or by the representative with the employee's consent, within 14 calendar days of service of the notice of discipline. If the disciplinary grievance is signed by the employee's representative, and the appointing authority or the designee of the appointing authority requests written confirmation of the employee's consent to the filing of the grievance, such written consent must be provided to the appointing authority or the designee of the appointing authority no later than three (3) days prior to the meeting. The employee shall be entitled to a meeting with the department or agency head, or a designee. The

meeting shall include an informal presentation by the department or agency head, or a designee, and by the employee, or a union representative, of relevant information concerning the acts or omissions specified in the notice of discipline, a general review of the evidence and defenses that will be presented if the matter proceeds to the next level, and a discussion of the appropriateness of the proposed penalty. The meeting need not involve the identification or presentation of prospective witnesses, the identification or specific description of documents, or other formal disclosure of evidence by either party. The meeting provided for herein may be waived, in writing, on the grievance form, only in accordance with Section 33.4(c)(2). A written response shall be rendered in person, or by certified mail, return receipt requested, no later than seven (7) calendar days after such meeting. If possible, the department or agency head, or a designee, should render the written response at the close of such meeting. When the department or agency head, or a designee, fails to issue a written response within seven (7) calendar days from such meeting, the grievant or the grievant's representative has the right to proceed directly to the next appropriate level by filing an appeal in accordance with subdivision (f).

(f) Disciplinary Arbitration

(1) If a disciplinary grievance is not settled or otherwise resolved, it may be appealed to independent arbitration. Such appeal must be filed with the American Arbitration Association by certified mail, return receipt requested, on a disciplinary grievance form, with a copy to the appointing authority, within 14 calendar days of service of the department or agency response. If there is no department or agency response received within 10 calendar days after the department or agency meeting, the appeal to arbitration must be filed within 24 calendar days of such meeting. If the appeal to arbitration is filed by the employee's representative, and the employee or employee's representative has not already furnished the employee's written consent, the appointing authority or the designee of the appointing authority may request written confirmation of the employee's consent to the filing of such appeal. Such written consent must be provided to the appointing authority or the designee of the appointing authority no later than five (5) days prior to the first day of the arbitration hearing.

(2) The disciplinary arbitrator shall hold a hearing within 14 calendar days after his/her selection. A decision shall be rendered within seven (7) calendar days of the close of the hearing or within seven (7) calendar days after receipt of the transcript, if either party elects a transcript as provided in paragraph (8), or within such other period of time as may have been mutually agreed to by the department or agency and the grievant or his/her representative.

(3) Protection of Patient or Client Witnesses

(i) A patient or client witness will be protected, when giving testimony in a disciplinary arbitration hearing, by shielding the employee from view, in one of the following ways:

- use of a portable screen or partition consisting of one-way glass; or
- use of a closed circuit television in a live transmission with the employee in a separate room and the arbitrator, the representatives and the witness(es) in another room; or
- use of a one-way mirrored room with the employee in a separate room with the ability to view and hear the proceedings; or
- in a manner comparable and as effective as one of the above-stated.

A patient or client witness will be shielded in one of the described ways when a certified or licensed professional determines that there is a need for such protection for the patient or client witness. A determination that there is a need for such protection is not subject to review.

(ii) Additionally, where the employee is in a separate room during the arbitration hearing, a method of communication will be provided for the employee to communicate with his/her representative.

(4) Disciplinary arbitrators shall render determinations of guilt or innocence and the appropriateness of proposed penalties, and shall have the authority to resolve a claimed failure to follow the procedural provisions of this Article. Disciplinary arbitrators shall neither add to, subtract from nor modify the provisions of this Agreement.

(5) The disciplinary arbitrator's decision with respect to guilt or innocence, penalty, probable cause for suspension, or temporary reassignment, if any, and a claimed failure to follow the procedural provisions of this Article, shall be final and binding on the parties. If the arbitrator, upon review, finds probable cause for suspension without pay, he/she may consider such suspension in determining the penalty to be imposed. Upon a finding of guilt the disciplinary arbitrator has full authority, if he/she finds the penalty or penalties proposed by the State to be inappropriate, to devise an appropriate penalty including, but not limited to, ordering reinstatement and back pay for all or part of any period of suspension. The amount of any back pay award shall be reduced by the amount of any unemployment compensation benefits and any outside earnings paid to the employee during the time period for which back pay is awarded. For the purpose of this paragraph, "outside earnings" shall mean monies paid for work performed during those hours the employee would have been scheduled to work for the appointing authority had no suspension occurred. Nothing contained in this paragraph shall apply to settlements achieved pursuant to Section 33.6, Settlements. Under any such settlement, the amount of back pay, if any, and any offset thereto shall be determined by the parties as part of the settlement.

(6) The State and PEF agree that the American Arbitration Association (AAA) shall administer the panel of disciplinary arbitrators, unless during the term of this Agreement the parties by mutual agreement develop a procedure for the joint administration of the panel of disciplinary arbitrators. The State and PEF shall jointly develop a statement of special procedures and instructions to be followed by AAA and by disciplinary arbitrators. Pending the development of this statement, the instructions to the arbitrators, dated March 15, 1978, as amended, shall be considered to be in effect in this unit. The composition of the panel of arbitrators shall be agreed to by the State and PEF and such panel shall serve for the term of this Agreement. In those cases involving an allegation of patient, client, resident or similar abuse, the AAA must appoint the disciplinary arbitrator from a Select Panel of Arbitrators jointly agreed to by the State and PEF for the term of this Agreement. Notices of discipline in which the alleged misconduct includes matters that the appointing authority considers to fall within the jurisdiction of the Select Panel of Arbitrators shall state in their text that this disciplinary action, if appealed to arbitration, shall be appealed to an arbitrator appointed from the Select Panel of Arbitrators. Disciplinary arbitrators on the Select Panel shall receive special training regarding patient abuse and the disciplinary process. The special training shall be jointly sponsored by the State and PEF and provided through the AAA.

(7) All fees and expenses of the arbitrator, if any, shall be divided equally between the appointing authority and PEF or the employee if not represented by PEF. Each party shall bear the costs of preparing and presenting its own case. The estimated arbitrator's fees and estimated expenses may be collected in advance of the hearing. When such request for payment is made and not satisfied as required, the grievance shall be deemed withdrawn.

(8) Either party wishing a transcript at a disciplinary arbitration hearing may provide for one at its own expense and shall provide a copy to the arbitrator and the other party without cost.

(g) The agency or department head or a designee has full authority, at any time before or after the notice of discipline is served by an appointing authority or a designee, to review such notice and the proposed penalty and to take such action as he/she deems appropriate under the circumstances in accordance with this Article including, but not limited to, determining whether a notice should be issued, amendment of the notice no later than the issuance of the agency response, withdrawal of the notice or a reduction of the proposed penalty.

(h) An employee shall not be disciplined for acts, except those which would constitute a crime, which occurred more than one year prior to the notice of discipline. The employee's entire record of employment, however, may be considered with respect to the appropriateness of the penalty to be imposed, if any.

33.6 Settlements

A disciplinary matter may be settled at any time following the service of the notice of discipline. The terms of the settlement shall be agreed to in writing. Before executing such settlement, an employee shall be advised of the right to have a PEF representative or an attorney present and, if such representation is requested, shall be afforded a reasonable period of time to obtain representation. A settlement entered into by an employee, the PEF representative or an attorney, on behalf of the employee, shall be final and binding on all parties. Within five (5) calendar days of any settlement, the President of PEF or the President's designee shall be sent a notice advising him/her, in writing, of the settlement. Such notice shall be sent by certified mail, return receipt requested.

33.7 Definitions

(a) As used in this Section, "days" shall mean calendar days unless otherwise specified.

(b) "Service" shall be complete upon personal delivery or, if it is made by certified mail, return receipt requested, it shall be complete upon the date the employee or any other person accepting delivery has signed the return receipt or when the letter is returned to the appointing authority undelivered.

(c) "Filing" shall be complete upon actual receipt or, if certified mail, return receipt requested, is used, upon the date of mailing appearing on the postal receipt.

33.8 Timeliness

In the event of a question of timeliness of any disciplinary grievance or appeal to arbitration, the date of actual receipt shall be determinative when personal delivery is used and the date of mailing appearing on the postal receipt shall be determinative when certified mail, return receipt requested, is used.

33.9 Time Limits

Except as provided in Section 33.4(c)(2), time limits contained in this Article may be waived by mutual agreement of the parties. Any such agreement must be in writing.

33.10 Changes in shift, pass day, job assignment, or transfer or reassignment to another facility, work location or job station may not be made for the sole purpose of imposing discipline unless imposed pursuant to the provisions of Section 33.5, provided, however, that temporary reassignments may be made pursuant to Section 33.4.

In the Matter of the Arbitration

Between

The PUBLIC EMPLOYEES' FEDERATION, AFL-CIO (Re: Bruce Thompson, Grievant)

Union

and

STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Employer

Disciplinary Grievance Arbitration

Case No. AAA 01-16-0000-2993

Appearances:

FOR the Public Employees' Federation
Lisa M. King, Esq.
by David J. Friedman, Esq., Of Counsel

FOR the State of New York, Department of Corrections and Community Supervision
Matthew Bloomingdale, Deputy Director, Bureau of Labor Relations

OPINION AND AWARD

Pursuant to their collective bargaining agreement ("Agreement"), the parties selected the undersigned to serve as the arbitrator to resolve the instant dispute.

On September 7, 8 and October 18, 2016, the undersigned held hearings at the State Office Building in Utica, New York, regarding the above captioned disciplinary grievance. The parties, in lieu of oral closing arguments, elected to submit briefs or written closing statements, with an extension of time, on or before December 9, 2016. As of that date, the record was closed. The instant Opinion and Award, with a granted extension of time for filing, was due January 17, 2017.

EXHIBIT B

Both parties had a full and fair opportunity to present documentary and testimonial evidence. Based upon the evidence submitted and arguments made, the Arbitrator renders this Opinion and Award.

Disciplinary Charges

On or about January 20, 2015, the Employer (hereinafter "DOCCS" or "State") served the Grievant, Bruce Thompson (hereinafter, "Grievant" or "Mr. Thompson"), with a Notice of Discipline ("NOD") [J-3] alleging the following misconduct:

Charge #1

On December 24, 2015, while on duty at Mid-State Correctional Facility, you inappropriately gave inmates food in violation of Sections 2.2, 2.16, and 8.16 of the DOCCS Employees' Manual. Specifically, by your own admission, you inappropriately and without authorization gave an inmate in the library cookies which you had brought into the facility and told him to share them with the other inmates in the library, including inmate Hoose (DIN 07B4012), and inmate Johnson (DIN 06B2156).

Charge #2

On December 24, 2015, between approximately 7:45 a.m. and 11:10 a.m., while on duty at Mid-State Correctional Facility, you inappropriately demonstrated undue familiarity and provided food to inmates in violation of Sections 2.2, 2.16, and 8.16 of the DOCCS Employees' Manual. Specifically, you inappropriately and without authorization gave inmates in the library, including inmate Whitney (DIN 01A2402), inmate Hanley (DIN 02A0682), inmate Wellman (DIN11A0586), inmate Hoose (DIN 07B4012) and inmate Johnson (DIN 06B2156), food items from McDonalds which you had brought into the facility.

Charge #3

On or about December 31, 2015, while employed at the Mid-State Correctional Facility, you were found to have violated Sections 2.2, 2.35, 2.36, 8.4, 14.2, 14.3 of the DOCCS Employees' Manual and DOCCS Directive #2810 – "Information Security Policy". Specifically, on various dates culminating in the discovery of your actions on or about December 31, 2015, you personally or with the assistance of inmate Johnson (DIN 06B2156), engaged and/or allowed the following violations of these policies:

- Installed unauthorized computer software, including "Linux" and "Java Runtime Environment" (installed on or about 9/24/15).
- Allowed and/or failed to recognize that inmate Johnson (DIN 06B2156) engaged in unauthorized computer programming activities while working under your supervision (on or about 10/19/15).

- You modified or allowed permissions for client computers to be modified by inmate Johnson (DIN 06B2156) to enable features such as "right clicking", "my network places", "sound on", "windows media player on" and "solitaire".
- You changed or allowed to be changed the inmate clerk computer user privileges to "Administrator".
- Allowed or enabled the development of a separate interlibrary loan database program which was created by inmate Johnson (DIN 06B2156) and was password protected.
- Modified or allowed to be modified the computer disaster recovery plan by creating a shadow drive (in or about March/April 2015).

Charge #4

During the month of September 2015, while on duty at the Mid-State Correctional Facility, you failed to maintain proper tool control in violation of Sections 2.2, 8.4, 14.5 and DOCCS Directive #4930, "Tool Control". Specifically, you allowed inmates in the library to gain access to cd's from the Mid-York system which were used to add and/or change computer programs.

Charge #5

On or about April 23, 2015, which on duty at the Mid-State Correctional Facility, you communicated with an inmate without authorization in violation of DOCCS Employees' Manual, Section 2.15, 2.36, and 8.16. Specifically, you authored and sent a letter to inmate Myers (DIN 14A1568) through the inter-facility mail. This communication was authored while you were on duty and was not a necessary part of your work duties.

Charge #6

On January 7, 2016, at approximately 11:10 a.m., while in an interrogation at the Utica State Office Building with the DOCCS Office of Special Investigations, you provided false information in violation of DOCCS Employees' Manual, Section 4.16. Specifically, during this interrogation, you made the following false or inaccurate statements.

- You stated that you did not bring McDonald's food items for the inmates that work for you in the library.
- You stated you did not tell any correction officer that you had brought McDonald's food in for your inmate workers.

Charge #7

On or about June 23, 2015, while on duty at the Mid-State Correctional Facility in the library, you failed to devote all your time to performing your duties in violation of DOCCS Employees' Manual, Sections 2.1, 2.36 and 6.1. Specifically, you devoted your time and used State equipment to type non-work related documents referencing "The World According to Bruce", "Quarterly Report" and "Letter of Appreciation" in which you made unprofessional and inappropriate comments and notations as well as inaccurate statements such as, but not limited to, "euthanizing troublesome inmates", "refusing to accept any horse shit", and "elicit Albany's awe and praise".

The State seeks Grievant's dismissal from service and the loss of any accrued annual leave time.

On January 12, 2015, Grievant was suspended without pay [J-2] and remained suspended throughout all steps in the grievance procedure.

The text of specific rules referenced in the NOD are not repeated in their entirety but will instead be referenced within the body this Opinion and Award.

Issues

The parties could not agree on an issue statement. After review of each party's proposal, the issues before me are as follows:

1. Is there just cause to discipline Bruce Thompson for the charges contained in the Notice of Discipline dated January 20, 2016?

2. If there is just cause, is the proposed penalty of termination appropriate? If not, what is the appropriate penalty, if any?

3. Did the State's suspension of Grievant on or about January 12, 2016 meet the standard established under Article 33.4 of the parties' collective bargaining agreement and, if not, what shall the remedy be?

Background

Some facts are undisputed.

Grievant, at all relevant times a Senior Librarian, has been employed in State service for 13 years. For the past 5 years, he has worked in the library at the State's Mid-State Correctional Facility. His duties include the maintenance, tracking and purchase of books and/or media and ensuring that materials are free from items considered contraband by DOCCS (e.g., compact discs sometimes included with books, discussed, *infra*). He is also responsible for properly cataloguing and ensuring that media is appropriate for the inmate population, among other duties.

The library is equipped with eight (8) computers/work stations which are used to request books from a regional system (Mid-York). They are connected via a closed, site-based intranet. They do not have internet access.

During the period at issue, Grievant was the sole librarian at the facility.

The State's Case

Donald Oliver, Senior Investigator for three (3) years, conducted the Office of Special Investigations ("OSI") investigation. He has been employed by DOCCS for 22 years, first serving as a Corrections Officer and Sergeant before joining the OSI.

Oliver was assigned to investigate what he described as allegations of misconduct involving contraband, improper supervision of inmates and improperly extending administrator rights to the library's computer system. He reviewed allegations, conducted interviews, visited the facility and reviewed the computer system set-up with Linda Klimchak, the Albany-based system-wide supervisor.

During the course of testimony, Oliver identified a number of documents relevant to the instant case, including a 12/26/2015 memorandum from C.O. Pynckel to his superior describing Pynckel's 12/24/2015 observations of inmates eating in the library, noting McDonald's food wrappers in a library waste can and an assertion that Grievant explained to Pynckel that Grievant "...brought them in for my men." [S-5] Oliver identified his own Report of Interview of Michelle Debraccio, a Senior Offender Rehabilitation Coordinator, who described her observations of December 24, 2015. Among other things, Oliver reports that Debraccio told Oliver that Grievant stated that he brought breakfast "...as it was Christmas Eve." [S-6] Another memorandum from C.O. Janes and Sgt. Hall, dated December 29, 2015 chronicles their interviews of inmates who worked in the library. [S-8] Oliver also identified a "Report of Interview" dated December 31, 2015, handwritten by Oliver and signed by Inmate Johnson who, among other things, described his role in installing Linux setting up a database, shared folders, a shadow drive, an automated data back-up system and his creation of Microsoft Word documents. Johnson also wrote that he was offered Archway cookies by Grievant but Johnson denied being offered McDonald's food and denied seeing any other inmates eating McDonald's food. [S-9]

Mr. Oliver identified another document, entitled "Goals and Accomplishments" [S-10] which he discovered on the local network. Among other things, he described that the system was configured so that "any workstation can access Mr. Thompson's computer as if they were an administrator..." and that the configuration permitted any workstation to

"access everything on Grievant's computer." [T. of Oliver] Oliver further testified he found other documents, including a memorandum entitled "Quarterly Report" [S-11] which Oliver "pulled up" and printed from a shared drive. Oliver testified that Grievant revealed during his interrogation that he authored the document and characterized its contents as 'stress relief or stress release' and referred to S-12.

Oliver went on to testify about his concerns regarding the substance of S-11, i.e., that inmates had network access to it, highlighting words such as "euthanizing", "horse shit" and based on Oliver's experience as a C.O., expressed his own concern about the use of derogatory statements – that such language referring to inmates can result in dangerous reactions.

Oliver described the contents of S-14 – a memorandum also printed by Oliver from the network - which appeared to be from Grievant replying to an inmate. Oliver testified it was not ordinary correspondence and – to the extent that the issues discussed in it were not reported to the command chain by Grievant - subverted the facility's internal grievance process, noting the need for the facility to catalogue the types of issues the memo attempts to privately address. Oliver went on to explain that inmate access to programs like Microsoft Word was not permitted because, for example, an inmate could author a falsified letter purporting to call for immediate release on a letterhead that could appear legitimate. He recalled that such an event had occurred earlier in his career.

Oliver then identified S-15, again printed from the library network, which appeared to be a letter from an inmate praising Grievant. Oliver testified that Grievant essentially adopted it as his own when confronted with it during his interrogation. Oliver also identified S-16, printed from Grievant's desktop and available to inmates, listing passwords for all systems used in the library. Oliver testified he tested some of the passwords and found that they worked. Similarly, Oliver found and printed S-19 from Grievant's desktop – a letter from Grievant addressed to an inmate who was apparently writing a book which was created to send to the inmate via intercompany mail. Oliver described the letter as "too personal" and "too close" and, in Oliver's view improperly bypassing internal mail controls and potentially leading to more relaxation of rules and compromising the security of the facility. Oliver noted that Grievant was not authorized to use inter-facility mail with inmates and was limited instead to staff-only communications.

Oliver identified S-20 as a "disaster recovery" plan he printed from the local network which he learned from Grievant during his interrogation was created by Inmate Johnson. It was created to set up a recovery database in the event of a main system crash and was available on the shared drive Johnson had already created. Oliver testified that the development of this type of system required prior approval and, in any event, should have been created by an employee, not an inmate. When Oliver questioned Grievant, Grievant stated he lacked the knowledge to create the system on his own. Oliver characterized the development of the system as representing and a general impropriety of 'inmates giving instructions to employees' and exposing the State to potentially malicious activity on the part of the inmate. Oliver also testified that he found and printed S-21 which contained log in instructions accessible to all inmates using the local network. Oliver also took screen shots [S-22][1] which included music files created in October of 2015 by Inmate Johnson. Oliver explained that CDs are considered "Class A tools" – referring to S-3 – the use of which must be strictly and directly monitored by a responsible employee, including maintenance by the librarian in a separate, locked box. He further explained that CDs are not picked up by metal detectors and can be easily fashioned into weapons.

Referring again to S-22, Oliver testified he saw and photographed McDonald's cups and noted that Grievant denied providing McDonald's food for inmates but admitted to offering cookies to an inmate.

SI Oliver testified further, turning attention to S-23, a four (4) page statement written by Grievant. Oliver did not know 1) if a union representative was present at the time Grievant was directed to write the statement or 2) whether Grievant was given a statement of rights as a potential "target". Oliver characterized the genesis of the statement as part of an internal investigation which he described as common practice.[2] In general, Oliver explained that neither an inmate nor Grievant admitted to an offer or acceptance of McDonald's food items but the C.O. who was directly outside of the library gave a statement indicating he observed a bag, inmates eating and food wrappers in a library wastebasket, noting that the

[1] S-22 (A-P) includes a series of printed screen shots SI Oliver saw as he conducting his investigation and which depicted – among other things – unauthorized items such as the game Solitaire and an inmate workstation with access to Grievant's desktop folders. S-22(L) and (M) are photographs of McDonald's cups Oliver found while conducting his investigation in the library.

[2] The authenticity of S-23 is not at issue. Its admission as evidence is at issue, discussed, *infra*.

C.O. came forward on his own and, in addition to his other observations, found McDonald's cups. Similarly, Oliver recalled that Ms. Debraccio approached him to volunteer information, including her observation of Grievant entering the facility, returning to his car and re-entering the building with a large McDonald's bag. Oliver credits Debraccio's recollection.

On cross examination, Oliver acknowledged that C.O. Pynckel's statement what silent regarding what he saw inmates eating on December 24, 2015 and agreed that a C.O. should have specifically known what was in Grievant's bag because it should have inspected it when it came through security. Oliver also confirmed that inmate mail is subject to screening before mailing outside of the facility but not all mail is actually checked.

Oliver also acknowledged the library was a "closed network" with no Internet access, that the type of food – here, McDonald's – is contraband if provided to inmates but would not be considered contraband if brought in for an employee's birthday, for example. Oliver also recalled instances where an inmate was upset about the privileges of others. He discussed an example of an inmate/clerk at a maximum-security facility who, by virtue of his job, might be permitted extra showers or water.

Linda Klimchak, Associate Librarian since May, 2013, has been a DOCCS employee for over ten years, including service as a Senior Librarian. She is based in Albany and manages state-wide computer systems in 50 division general libraries.

Klimchak testified she was aware of the circumstances surrounding the instant case. recalled being asked by Anne Joslyn to inspect the set-up/approved configuration of the computers at the facility's library. When she began her inspection she first noticed that she was locked out – that the Administrator password had been modified - citing it as a red flag. She also discovered that other workstations were altered from the original set-up. She described standard user names that should remain consistent across facilities but could not log in, noting that the password for "Associate" – which should have been known only to her – had also been altered.

Ms. Klimchak identified herself as the author of S-24, explaining she created the document as notes to herself indicating changes she observed when comparing the Mid-State set up *vis a vis* the standard set-up she expected. It included, among other things, enabling

"right clicking", "sound on" and Solitaire. She noted in S-24 that "Inmate Clerk user privileges were modified to Administrator", Java Runtime installed on September 24, 2015, the creation of a "user name 'A' with Administrator on the Circulation computer and an Interlibrary Loan database created by an inmate and password protected." She shared the notes with her supervisor.

In further testimony, Ms. Klimchak stated that right-click ability on inmate-used computers permitted anyone to change names, icons. She also noted that "my network" should be turned off to prevent inmates from navigating through the network. Klimchak explained that inmate computers should be 'desk-top restricted'. Additionally, workstations should not have "sound on" and no access to games. She further testified she herself did the original installation of the Mid-State system. She noted she never authorized an inmate to have Administrator privileges which are reserved only for her and the Senior Librarian.

She described a short-cut to a Microsoft Excel spreadsheet and a Microsoft Access database – stating it "was nice" but should not have been there and further noted that she – who gave no authorization for its creation – did not even have a password to access it. She finally got the password when an inmate gave it to her.

Ms. Klimchak described that the creation of new user accounts are made by her and that anyone with Administrator privileges has access, noting further than no one but her – not even Grievant – has authorization to create new accounts. With regard to the discovery of Linux on the system, Klimchak testified that it was not on any other computer in the State and that she would not have approved it if asked.

On cross examination, Ms. Klimchak stated she was not familiar with the NOD in the instant proceedings, heard Grievant was "locked out" and described DOCCS policy on inmate library use in the absence of a civilian librarian was, as far she knew, a facility decision. She recalled a discussion with Grievant – by her reckoning at least two years prior – regarding backing up the Mid-State system. She did not recall specifics.

Scott Johnson, an inmate at Mid-State, has served 10 years of his fifteen-year sentence for a sex offense. He recalled his work as a library clerk at Mid-State, describing it as cataloguing, computer programming for the library and addressing general needs. He described his work on building a Microsoft Access database which became an 'inter-library

loan system' which he stated was in use in 2015. He described himself as a programmer for 35 years. He recalled first developing an application via Access and telling Grievant "after the fact" that "this is what we can do". He recalled Grievant agreeing that it was a good idea.

Johnson adopted S-20 as his own work, stating that he created it after a database crash when it took three days for data recovery. The back-up system (via the server) automatically runs every two hours with up to 30 days of back-up and takes ten minutes to restore data in the event of a system crash. He described the "volume shadow" he created which uses free space on hard drives. Johnson estimated that 90% of the population would not know how to create this system and that Grievant did not know.

Mr. Johnson described Grievant as "a good boss" who "had the ultimate say-so". Johnson recalls being told that McDonald's was brought in on December 24, 2015 and testified "I didn't get any", recalling "I got an oatmeal cookie". He testified he knew of no one who got McDonald's food and would not believe anyone who claimed they did.

Johnson recalled being approached by a Sergeant who called him and others into the library and questioned inmates separately. He recalled begin asked about "McDonald's, cookies and computers." He recalls telling SI Oliver, reading the transcription and signing the document. He adopted the document as an accurate writing of what he told Oliver. [S-9]

Johnson went on to explain that he maintained "general user" access and when he explained to Grievant what he needed to do got Grievant's approval "on a case-by-case basis". He recalled creating overdue notices, requisitions and lists on his computer, printed drafts for Grievant's review on Grievant's printer and created pre-printed forms because "I had the ability". Regarding Linux, which he described as a free, alternate operating system, Johnson testified he could do programming with it but the system was eventually abandoned. He ordered the Linux book from Mid-York which contained a CD. Johnson stated that Grievant kept the CD and put it in the machine for him, volunteering "all it takes is a C.O. to see me with a CD and it's big trouble I didn't want". He went on to describe the CD as "the equivalent of a weapon". Johnson recalls installing Linux and creating shared folders on the general network which he could access from his own computer which "let me do documents" and "he could always see what I am doing". He acknowledged that "I could have done something to harm the system; I had print capabilities and could have printed without him knowing". He recalled that Grievant "always wanted to know what I was printing."

Turning to music, Johnson testified he ordered CDs from Mid-York – one was a Christmas album from 2014 – and recalled he ordered a total of three (3).

Johnson further testified that Grievant "made it clear to minimize windows if on Microsoft Word" and to "head off questions" and testified that Grievant told him "what people don't know doesn't hurt them."

In continued direct testimony, Mr. Johnson stated that since Christmas Eve of 2015 the library has been opened two nights per week, limited to magazines and newspapers. In describing the ILL, Johnson stated it was password protected but "not very secure" because passwords were stored in an Access database and were there more for identification than security. Johnson created passwords but Grievant could change them. Johnson could not change them but could add a user if he chose.

On cross examination, Johnson claimed no familiarity with the NOD and stated that since December 24, is no longer working in the library but is, instead a porter. He described enjoying computer work, feeling a sense of accomplishment.

Michelle Debraccio, a Supervisor of Rehabilitation Coordination in the Guidance Unit, has been employed by DOCCS since 2002 and at Mid-State since 2004. She has held her current position since January 2014. She testified she knows Grievant and recalled the events of December 24, 2015. Debraccio arrived at 7:30 a.m. and recalled "Bruce already there, going in" and saw him return to his car, opened the trunk and brought out a large McDonald's bag and large gallon of a beverage. She recalled being on the phone at that time. She then walked into the building with him, stopped to pick up her keys on her way to the guidance unit. She described the check-point at Building 101, staffed with a CO handling keys and another C.O. to check bags. Debraccio stated that bags are usually put on a counter and that a C.O. might "peek in but it doesn't always happen". She recalled that no one checked her bag or Grievant's.

Debraccio testified she got to Building 3 – the Guidance building – and spoke briefly with Sharon Flanagan and recalled mentioning that it was odd that he had a large bag of McDonald's and a gallon beverage container when there were no civilians working in the library. Debraccio identified and adopted S-7 as a true account of what she told investigators.

On cross examination, Ms. Debraccio stated she was not familiar with the charges against Grievant and that Grievant was holding the McDonald's bag in the open, not attempting to hide it and that she could not see through the bag.

Anne Joslyn, Deputy Superintendent of Programs since 2009, has been employed by DOCCS since 1992 and served in increasingly responsible positions including Assistant Deputy Superintendent. She has known Grievant since 2007.

DS Joslyn described Mid-State as a medium security, campus-like facility with 700 inmates with mental health issues including a special unit with 300 seriously mentally ill inmates. The facility serves as NYS Office of Mental Health (OMH) satellite with vocational and academic training and drug and alcohol treatment. The total inmate population stands at 1,560.

Joslyn was made aware of allegations that Grievant had brought food into the facility and that an OSI inspection uncovered a compromised computer system in the library. Joslyn first learned of the food allegation the same day from a Watch Commander. She called labor relations and OSI was called in to perform a routine search. Stating she was familiar with the NOD, Ms. Joslyn was asked a series of questions based on each Charge in the NOD:

Regarding Charge 1 and 2, DS Joslyn affirmed that the bringing cookies or McDonald's food for the inmates in the library was prohibited by rule and that it was not professional.

Regarding Charge 3, Joslyn characterized the substance of the Charge as representing a serious security issue and clearly prohibited by Directive.

Regarding Charge 4, Joslyn again characterized the substance as a serious security issue involving Class A tools and in violation of clear a Directive. She emphasized that Grievant was responsible for security, noting that he is the only employee with several inmates in the library with him. When asked about the possibility that Grievant did not understand the rule, Joslyn stated that he should check with an Assistant Deputy. Joslyn identified S-3 and stated that "direct observation" of an inmate in this context means that the employee must be in the immediate vicinity – "not hovering, but able to see what the inmate is doing."

Regarding Charge 5, DS Joslyn testified in sum and substance that the relevant rules are meant to enforce business-like communications between employees and inmates and that the establishment of "very clear boundaries" is necessary in a setting with a "highly manipulative population".

Regarding Charge 6, Ms. Joslyn testified that honesty when answering questions was required and when not truthful, it compromises the safety of staff and inmates.

Regarding Charge 7, Ms. Joslyn characterized using State resources for personal business as compromising safety, noting that all employees should be well aware of the rules because each employee receives the manual at the commencement of employment.

Turning attention to Grievant's work history, DS Joslyn referred to prior counseling - [S-25 and S-26] - and, in one instance Grievant was discovered to have been on his personal phone for 27 minutes while inmates were present and while on the phone turned down the television so he could hear the caller. He gave his personal email address which was overheard by inmates and made negative remarks about a colleague. Joslyn described Grievant's behavior as potentially inviting inmates to engage in a "divide and conquer" strategy.

Finally, Ms. Joslyn testified about a 2014 NOD [S-28], resolved via stipulation, and her concerns about the possibility of Grievant's continued employment. In sum and substance, Joslyn expressed frustration that 'after trying to get him to comply with rules Grievant has now permitted an inmate to breach rules'. Joslyn expressed concerns about security, stating "I can't trust him as an employee" and stated her belief that the safety of the facility and staff would be compromised if he returned.

On cross examination, DS Joslyn acknowledged Grievant's employment history of "S" ratings throughout his time with DOCCS, her lack of personal knowledge of Grievant's actions alleged in the NOD and recalled having called him a "dedicated" employee in the past.

The State characterizes the whole of the charges as "...demonstrating overfamiliarity the inmates who worked for him, failing to follow security protocols, failing to devote all his time and effort to the performance of his duties, and for providing false and/or misleading information to Department Investigators." [State's Brief at p.10]

The Union's Case

Bruce Thompson testified on his own behalf. Grievant's educational background includes an undergraduate degree in Political Science from the University of Buffalo and a Master's Degree in Information Studies from Syracuse University. Prior to joining State service he served as the Director of a township library system and as a part-time law librarian with the Onondaga County Sheriff.

He began his DOCCS employment as a part time employee at the Auburn Correctional Facility and in 2005 was promoted to a full-time Senior Librarian at the Oneida Correctional Facility, transferring to Mid-State in or about October, 2011. He described his duties as including supervising inmates, purchasing, purging, ensuring book series were available, including reference, periodicals, magazines and a wide range of book genres including fiction, non-fiction, history, sociology, philosophy, finance and religion. He further explained that the library does not hold books involving the subjects of medicine, weapons, wilderness survival or some others in its collection.

Grievant explained that between five (5) and nine (9) inmates were assigned to work in the library, and he generally works on a Monday-Friday schedule from 8 a.m. to 4 p.m. Deputy Superintendent, Anne Joslyn, is his supervisor.

Turning his attention to December 24, 2015, Grievant recalled the typical check-in procedure of approaching a counter to get his personal alarm and keys. He testified he stopped at McDonald's on his way to work and bought a "big breakfast" consisting of eggs, sausage, a muffin, hash browns and believes he also ordered juice, all "to go". He arrived at the facility, parked his vehicle in his usual spot, just outside Building 20. He did not recall seeing anyone in the lot. He recalled seeing Ms. Debraccio who joined him at the gate. Grievant recalled that he had already finished his breakfast and had water for coffee, his lunch and his briefcase, had the McDonald's bag with him, had emptied the bag and put his file folio into the bag. A package of cookies, intended as a part of his lunch, was also in the bag along with a lunch sandwich. Grievant recalled that he was beginning a vacation period the next day. He described engaging in small talk with Ms. Debraccio.

Grievant testified that he never said he was giving "food to my men," had no intention of doing so that day and went to the library. Grievant recalled that as they entered

Building 101, Debraccio went ahead of him; she went to the C.O., collected keys and he walked behind and put his belongings on the counter, went back, picked up water, opened his bag in front of the C.O., went through the metal detector and made his way to the library. He recalled unlocking the library, turning on lights and preparing the environment for work. He described his usual habit of arriving between 7:15 and 7:30 a.m. – using the extra time to get ready and recalled arriving between 7:25 and 7:30 a.m. on December 24, 2015. He put his lunch in a refrigerator located in the recreation room which he permitted to use, placed his portfolio in his locker (which is within the library), the water into a cabinet, made instant coffee and turned on the lights. He described the cabinet as located behind him and locked. The "rec room" was described as small and across the hall from the gym. After turning on his computer, he prepared for a "SHU" delivery which he described as involving a "separate, involved process" mostly involving inventory control.

Grievant recalled that four (4) to (5) inmates came to the library on December 24, 2015 and specifically recalled Inmate Johnson arriving after 8 a.m.; he further recalled assigning each to a specific task. He recalled the necessity for issuing overdue notices, preparation for the SHU delivery and getting book shelves in order.

Grievant further testified that there was entertainment in the library that day – *Miracle on 34th Street and It's a Wonderful Life* – on a library flat screen television. He described, in general, his opportunity to eat lunch between modules, pegging the time from between approximately 11:15 a.m. and 12:30 a.m. He ate some cookies but not all of them because he did not like them. With the package of cookies still there and in his way, he had forgotten they were there. By the time 3-5 inmates entered for the second module, the cookies were still on his desk and as he went to throw them away "I looked at an inmate and said, here, share" and assumed they were shared but did not know what happened to them.

Grievant also recalled a discussion, later that day, with C.O. Pynckel who told Grievant he thought he saw inmates eating something and asked if he gave them anything. Grievant testified he responded to Pynckel "just cookies" and could not recall anything else. He recalled leaving work at or about 4 p.m. and denied having any conversations with others. Grievant then identified a photocopy of his credit card statement for December 2015 [U-2] and stated he did not give any McDonald's food to inmates.

Grievant then described his responsibility with respect to CDs. He confirmed that the library had CDs, described that they were a "Class A Tool" and were therefore locked inside of case that was in a locked cabinet in the library, which is also locked. When asked about music downloads, Grievant described the CDs as coming from "outside" via inter-library loan. Grievant denied handing music CDs to Inmate Johnson or anyone else.

Grievant recognized S-2 – a document signed by him regarding the facility's Employee Manual – and recalled receiving it at the same time he signed S-2.

Grievant was asked to identify, recall and explain a number of State exhibits:

S-19: Grievant testified that Inmate Meyers was "interested in existentialism" and explained he was merely answering the inmate's questions. He did not recall when he wrote it.

S-13: Shown the exhibit, Grievant testified about its genesis: that Ms. Joslyn "informally, she referred to me as a woodpecker."

S-11: Grievant adopted the writing as his own, characterizing it as "gallows humor" and stating he wrote it at his desk while eating lunch, never shared it with anyone, never printed it and after writing it, forgot it was on his desktop computer.

S-15: Grievant recognized the document, stated that it was written in 2011 and stated "I copied this from a letter handwritten by an inmate who worked in the library."

Grievant's attention was then directed to Inmate Scott Johnson. He described Johnson as "highly recommended at Coxsackie" and testified he "needed computer experience" for cataloguing and proficiency in "how to make changes". He described the library technology set up: 8 computers, one of which is a "small business" server, explaining that only his has the server. Two (2) "OPAC" workstations "accessible to anyone". Of the other five (5), Grievant stated that any "inmate employee" could use them but each required a password to log on and access the local network. There is no Internet access. Instead, there is access to a circulation program residing on the server. Those desktops have blank screens except for approved icons and, among those, are password protected.

Grievant explained that the Inter-Library Loan computer crashed and he had to get the program back running for inventory and circulation control. He recalled DS Joslyn getting another computer and recalled telling her the "ILL burned out" but did not recall how she responded.

Grievant continued, explaining he could not get the "mainframe, tower" to recognize the new computer; Johnson helped to restore it by going to Grievant's computer, installing Grievant's computer as a "client computer". Johnson also set up a circulation database using Microsoft Access, characterized the work as replacement and improvement and estimated that 80% of the work was performed by Johnson and 20% by Grievant. Grievant then discussed the operation prior to Johnson's arrival to the library's inmate workers' group. He recalled reaching out to Linda Klimchak regarding the creation of a back-up system and suggested to her procuring a "parallel tower" which was rejected; an external hard drive was considered but became a "lock up issue" and recalled Klimchak telling him to make use of existing equipment.

His attention turned to January 3, 2016, Grievant testified he returned to work after a week's vacation, stopped at the booth in Building 101, was informed DS Joslyn wanted to see him. He went directly to her office. DS Joslyn asked him "a couple of questions" and then entered a conference room to write a statement about what he did on December 24, 2015. He wrote the statement, did not perform his regular duties, was not permitted in the library and was "not told much." Grievant identified and adopted his statement [S-23] Grievant affirmed that a union representative – Mr. Joachin – was with him when he wrote the statement and when he completed it, he was sent home.

Turning back to the library's computer set-up, Grievant testified that an automatic downloading/back-up system (backing up to a stand-alone computer) was created, specifically a "data back-up, not a program". Grievant estimated that before the automatic back-up was created it took him 8-12 hours to manually perform the data back-up. The new system backed up data much more frequently – every two (2) hours – and was accomplished with Johnson's assistance, specifically stating "he filled in and I set the parameters".

Grievant concluded his direct testimony by stating that if he was returned to work he would never share food again, would never allow an inmate to program and would ask for permission, averring that "I should have told DS Joslyn". He described how he liked books

and reading and sharing it with others and finds it "interesting to talk to inmates about books". He also stated he likes working independently, setting his own priorities, being busy, enjoys variety and learning new things.

On **cross-examination**, Grievant recalled being interrogated in January 2016 regarding events in late 2015. He denied that his memory of that period was better on the dates of the instant hearing than it was in 2015 but stated his memory about his route to work on December 24, 2015 was better at trial than it was when he was interrogated, explaining that more information was available to him since then.

Asked questions about the interrogation transcript from January 7, 2016, Grievant testified that he looked at a credit card statement [U-2] since the time he was interrogated. He explained that he had two (2) credit cards, one for Internet billing and "one for everything else". He stated that during his interrogation he was uncertain if he had stopped at McDonald's on December 24, 2015 but sees from his credit card statement that he paid by credit card, meaning he had no cash with him on that day, leading to his recollection than he planned to eat breakfast at McDonald's, had the time to do so, ordered a "big breakfast" platter, ate some at the restaurant, packed up what was left, got into his car, drove to the facility and ate the remaining food from the bag.

Grievant was then asked to review the interrogation transcript: ("Q: At any time, did you stop at McDonald's that day? A: I don't recall. Q: Did you walk into the facility with a McDonald's bag? A: I don't recall that either.") [S-12 at 83-4]

Grievant was then referred to the transcript at page 75 ("Q: You stopped at a store? A: Oh, I picked up some – it was – yeah, I stopped at the store and got cookies. Q: What store did you stop at? A: Geez, I don't know. It was Price Chopper or a convenience store. Price Chopper, I think it was. Archway Cookies. It was a 24-hour store.") and asked if he recalled testifying on direct examination in the instant proceedings that he brought the cookies from home. Grievant explained that he stopped at Price Chopper but not on December 24, 2015. Again, he confronted with his direct testimony in these proceedings – that he brought the cookies from home - and was directed again to the interrogation transcript: ("Q: I didn't ask you if you would word it that way. Did you bring the food in from home? The cookies, did you bring them in from home? A: No. I brought them from the store.") [S-12 at 83, lines 4-7]

When asked about his statement that he understood the questions during his interrogation [S-12 at 90] Grievant testified that he did not recall at the time that he had visited McDonald's on December 24, 2015 and did not recall what he had placed inside the McDonald's bag that day, stating that his recollection was better during his direct examination in the instant proceedings than it was during his interrogation.

In continued cross-examination, Grievant acknowledged that there is no other civilian employee in the library and no one checks his work on a daily basis. He testified, *inter alia*, that he orders books that inmates want if not already in the collection and described his review process, book-by-book, to ensure the subject matter is appropriate or – simpler, in his view – that he determines it falls within the "not-allowed" category. In addition to rejecting books about weapons, chemistry, medicine and drugs, atlases, for example, are "frowned upon" and subject to closer scrutiny to ensure they do not show fine geographic features or, for example, are maps of New York State. After his request (to Mid-York), the book comes through the gate in a locked bag and he is the sole person to open it. He conducts a search and especially looks for CDs.

Grievant was then asked a number of questions about computer programs and music media on Mid-State's library computers. Grievant stated that he used a CD to put the music folders (available on the network) on the desktop. Grievant was asked whether Inmate Johnson was untruthful when he stated that he, not the Grievant, put the music on the computer. Grievant responded that he allowed Johnson to download "a couple of songs" but Johnson never touched the CDs.

Grievant acknowledged that he had no role as a counselor at the facility and was not a vocational instructor except for inmates in the library. He denied ever sending personal letters to an inmate. Regarding the "Quarterly Report" found on his computer [S-11] Grievant acknowledged that its contents could be offensive to inmates. Regarding the letter praising Grievant [S-15], he explained that he liked the inmate's statement so much that he typed it.

In further cross-examination, Grievant stated he did not believe any workstations other than his own and Inmate Johnson's had Microsoft Word; in Johnson's case he had the program so he could create forms as part of his work. Regarding Microsoft Access, Grievant testified that he and Johnson used it – 80% by Johnson and 20% by Grievant, explaining that

he monitored Johnson but not every day and did not know exactly what Johnson was doing. He knew Johnson was doing programming, work that Grievant believed would have taken him far longer if he tried to do it himself and acknowledged that he did not fully understand everything Johnson was doing. Regarding administrative passwords, Grievant testified he changed them and that additional user accounts were created. He denied modifying the system set up. He testified he did not believe he needed Ms. Klimchak's permission to do the things he did.

Grievant stated he believed Solitaire was only available on his own computer workstation and was not aware that it was prohibited. Shown S-24, Grievant testified that he alone was the "Administrator," did not change the password or extend Administrator privileges to inmates. He recalled bringing a CD with Java and placing it in Jefferson's CD drive, had Johnson download and install it. He stated it was only installed on Jefferson's workstation because there was no need for him to have it on his computer. He denied knowing that he needed permission to do so.

Grievant further testified he knew Ms. Klimchak and thought of her as "tech. support", denied any past problems with her, has known her for a long time and characterized his relationship with her as "good". Grievant stated that the library's data back-up was improved - with most the work done by Johnson – and Johnson was permitted to use Microsoft Word to create needed forms. Shown S-20, Grievant recalled he asked for this from Johnson and Johnson created it. Grievant acknowledged that he did not know how Johnson created the back-up system and once it was completed he did nothing with it except locking it in a filing cabinet.

On redirect examination, Grievant, again discussing S-20, testified he never used it and thought it was "something that it wasn't". Its purpose was for disaster recovery. Asked about how his recollection of events was better during the instant proceedings compared to his recollection at the time he was interrogated, Grievant explained that during the interrogation he was trying to be cooperative, that the tone of the interrogation was accusatory, implying he did not have time to fully explain himself during the interrogation.

On re-cross examination, Grievant was again shown S-12 where he was asked about whether he understood and had told the truth during the interrogation and had indicated he did. Grievant explained that he did not believe he had time to ask questions and "left it to

Joachim to ask" but Joachim did not ask. Grievant acknowledged that no request had been denied.

On re-redirect, Grievant could not recall if SI Oliver gave him a copy of rights under Article 33 of the collective bargaining agreement but recalled asking for a postponement to get a union representative – not Joachim. He did acknowledge that Oliver gave a statement of rights and that he stated he understood them [S-12] but claimed he did not in fact understand and was "befuddled and confused" during the interrogation.

Discussion

Each Charge and Specification is discussed individually, including specific arguments from each party.

The following determinations are based on the issues and consideration of the competent and/or credible evidence:

Charge 1

The State argues, *inter alia*, that Grievant's prior statements and testimony establish guilt.

The Union argues, *inter alia*, that the charge "...does not conform to the record evidence..." The Union's argument fails.

Charge 1 states, in relevant part: "...an inmate in the library cookies which you had brought into the facility and told him to share them with the other inmates in the library, including inmate Hoose (DIN 07B4012), and inmate Johnson (DIN 06B2156)."

On its face, the Charge does not require a finding that every inmate in the library ate the food. Grievant consistently acknowledged giving cookies to "an inmate" with instructions to share them. There is no dispute that the two named inmates were present in the library at the time. There is no requirement that the State prove that each – or any – of the inmates listed actually ate the cookies.

The only relevant factual question – resolved via testimony and a review of the entire record – was whether Grievant gave the cookies to an inmate and whether he instructed the inmate to share them. To whatever extent the Grievant believed his actions were the result of

happenstance, a minor error or the result of being unaware of the facility rules, the cited rules are clear and were presented to Grievant at the time he began working at the facility:

> 2.2 "An employee shall not knowingly…violate…any rule…or directive of the Department…"; 2.16 "An employee of the Department will not…(d) [g]ive or extend to any inmate…any favor of privilege of diet…not common to all; 8.16 "Employees shall maintain a quiet, firm demeanor in their contacts with inmates with no undue familiarity…

The credible evidence in the record, coming from a variety of sources, including the direct testimony of Inmate Johnson, Grievant's interrogation and repeated admissions, more than demonstrate he is guilty of this allegation and that giving the cookies amounts to giving a "favor of privilege of diet". It is no stretch to characterize giving a food gift to a small group of inmates whom Grievant regularly supervised as "undue familiarity". Regardless of intention, it represents an improper departure from the professional boundaries the facility demands.

The State has well-established Charge 1, by preponderant evidence, as written.

For the foregoing reasons, Grievant is guilty of Charge 1 by preponderant evidence.

Charge 2

The State relies heavily on the statement of C.O. Pynckel who described his interaction with Grievant on December 24, 2015. Specifically, Pynckel stated he saw Grievant entering the library at or about 7:45 a.m. carrying a large McDonald's bag; later, at or about 11:10 a.m., during his security round, Pynckel wrote entered the library, saw several McDonald's food wrappers in a garbage can, confronted Grievant and Grievant stated to Pynckel that "I brought them in for my men". [S-5]

Here, the State points out that Grievant first said he had no recollection of speaking to C.O. Pynckel on December 24, 2015 and that he brought Archway cookies into the facility that day but did not recall having bought or brought any McDonald's food into the facility and denied speaking with any staff members about the bag or food items. [S-12] The State contrasts these statements with Grievant's testimony some 10 months later during the instant proceedings: 1) he recalled buying Archway cookies prior to December 24, 2015; 2) he

specifically recalled that he bought and consumed a large McDonald's breakfast just before entering the facility on December 24, 2015; 3) despite his early account that he spoke to no one, Grievant testified that he did recall speaking to C.O. Pynckel on December 24, 2015 and when confronted, told Pynckel that he had given cookies to inmates but denied that he ever told Pynckel he provided McDonald's food to them.

The State also relies on Ms. Debraccio's initial, unsolicited report and her testimony in the instant proceedings: 1) she knew Grievant as a co-worker; 2) observed him with a large McDonald's bag; 3) she recalled thinking it was odd that it appeared Grievant was bringing in a large amount of food; 4) Grievant told her at the time he "brought in breakfast because it was Christmas Eve" or words to that effect.

Ms. Debraccio's testimony is sufficient to make some findings of fact. Her testimony was consistent with statements made during the OSI investigation [S-7]. If there were much question about her veracity or motive, she notably declined to state that she actually saw what food, if any, was in the bag. There is no other evidence in the record establishing any motive to give an untruthful statement during the investigation or at trial. In short, Debraccio's testimony has a clear ring of truth. I accept it, including her recollection that Grievant directly made an admission against interest when telling her that he 'brought in breakfast because it was Christmas Eve.'

The chief problem with the State's evidence is the absence of live testimony from C.O. Pynckel. As the Union argues, the record is devoid of any eyewitness testimony establishing the actual contents of the bag Grievant was carrying on December 24, 2015. Nor is there any testimony from an eyewitness about any McDonald's food wrappers or any specific admission Grievant made about providing McDonald's food to inmates. The Union notes that Inmate Johnson – one of the alleged recipients of the McDonald's food – testified for the State in the instant proceedings and denied ever seeing it, receiving it or hearing about others receiving it or seeing it. The Union essentially asserts that the State cannot have it both ways – reliable testimony regarding his extensive computer programming activities and unreliable testimony relating to the allegations about food gifts. On this point, Union is correct.

Here, the Grievant has consistently denied providing McDonald's food to inmates on December 24, 2015. The State argues – mostly correctly – that Grievant's prior statements

and testimony are significantly inconsistent and not credible. The record evidence establishes as much.

In sum, the real issue here is quantum of proof. There was no witness in these proceedings who testified 1) seeing McDonald's food in the bag Grievant brought onto the property; 2) seeing inmates eating McDonald's food in the library or 3) being explicitly told by Grievant that he brought in McDonald's food for inmates in the library.

While there is no general prohibition on the admission of hearsay evidence in an arbitration proceeding, the burden of proof in a disciplinary arbitration proceeding remains with the Employer. C.O. Pynckel's written statement contains the only witness allegation of a clear, specific admission against interest. Because Grievant never admitted at any time that he gave McDonald's food to inmates (other than to C.O. Pynckel based on Pynckel's written account) Ms. DeDebraccio's statements and testimony – while credible – do not by themselves establish an admission to the Charge as written. In a reverse situation – Pynckel's statement accompanied by his live testimony coupled with DeDebraccio's statement entered as hearsay without her testifying – DeDebraccio's statement could easily be viewed as generally consistent with and corroborative of Pynckel's claim. However, without live testimony and the opportunity to confront Pynckel – at least in this narrow context – Ms. DeDebraccio's statement and testimony is insufficient to support sustaining the Charge. This is true even though the Grievant's statements under oath in his interrogation were widely divergent from testimony in the instant proceedings.

For all of the foregoing reasons and based on the record as a whole, Charge 2 was not proved by preponderant evidence. Accordingly, Grievant is not guilty of Charge 2 by preponderant evidence.

Charge 3

For ease of reference, the specified allegations are repeated here in their entirety:

- Installed unauthorized computer software, including "Linux" and "Java Runtime Environment" (installed on or about 9/24/15).
- Allowed and/or failed to recognize that inmate Johnson (DIN 06B2156) engaged in unauthorized computer programming activities while working under your supervision (on or about 10/19/15).

- You modified or allowed permissions for client computers to be modified by inmate Johnson (DIN 06B2156) to enable features such as "right clicking", "my network places", "sound on", "windows media player on" and "solitaire".
- You changed or allowed to be changed the inmate clerk computer user privileges to "Administrator".
- Allowed or enabled the development of a separate interlibrary loan database program which was created by inmate Johnson (DIN 06B2156) and was password protected.
- Modified or allowed to be modified the computer disaster recovery plan by creating a shadow drive (in or about March/April 2015).

The State primarily relies on the investigatory work of SI Oliver, Ms. Klimchak and the statements and testimony of Inmate Johnson.

Ms. Klimchak, among other things, testified she conducted a review of the library's computer network and compared it to the way she herself had configured it. She discovered changes to administrator rights, newly installed software and changes in user rights and capabilities at computer workstations used by inmates. The specifics of the instant charge are mostly drawn from her post-investigation report [S-24]. She supported each assertion in her testimony, including that she was unaware of and never gave approval or authorization for any of the changes she discovered.

I found Ms. Klimchak's testimony credible and persuasive. It was straightforward and consistent with no apparent motive to be untruthful or otherwise embellish.

Inmate Johnson testified he had 35 years of experience in computer programming, built a back-up database on a Microsoft Access platform, created overdue notices, shared folders and a volume shadow. He conceded he had enough control to make other unapproved changes but declined to do so. His testimony was also consistent with his prior statement. His testimony regarding food gifts included hearing about inmates receiving McDonalds food but he readily admitted that all he knew for sure was that he was not among the recipients. Had he chosen to fabricate his testimony to ensure Grievant was subject to additional disciplinary action he could easily have asserted he was a recipient. His account of events is credible.

With the exception of the installation of Linux and the creation of a password-protected back-up database created with Grievant's knowledge by Inmate Johnson, Grievant denied knowledge of any of the changes during his interrogation in January, 2015.

The Union argues[3] that the charged misconduct is not actionable and should be dismissed because it is either untimely, stale or too vague and cites Article 33.5(h) which limits discipline for "acts...which occurred more than one (1) year prior to the notice of discipline" and specifically asserts that bullet-pointed specifications without dates (3, 4 and 5) are silent as to date and are therefore untimely and must be dismissed. The Union cites *Dep't of Taxation & Finance and PEF*, (Gaba 2015). Quoting from the decision, the Union urges a finding that the period of time was "far too broad and [did] not provide Grievant or the Union with the ability to formulate a meaningful defense." [Union's Brief at 11]

There is no difficulty reconciling the cited case with the instant case. The standard of review enunciated by Arbitrator Gaba is reasonable. In the instant case, both Johnson and Grievant testified that the overwhelming majority of the work in downloading a Linux operating system, creating a back-up inter-library loan database, a shadow drive, standard forms and other documents was performed by Johnson with Grievant's general knowledge. Grievant admitted that he could not have done the work on his own because he lacked Johnson's technical sophistication. There is no dispute that the only way Johnson could have secured the power to do any of the work he did was with Grievant's assistance in granting Johnson extraordinary access to and control over the library's entire network, so powerful – especially considering Johnson's superior skill level - that it exceeded Grievant's. If there is much question that Grievant understood the implications of granting such access and control, Inmate Johnson's credible testimony resolves it. Grievant specifically instructed Johnson to minimize any Microsoft Word document on his desktop if anyone from outside of the library entered it and told him that "what they don't know won't hurt them." [T. of Johnson]

The credible record evidence makes clear that Grievant considered Mr. Johnson a valuable library worker specifically because of his computer programming expertise. When viewed as a whole, the evidence shows Grievant laid out a plan to introduce some significant improvements in the efficiency and stability of Mid-State's library which, in another context and standing by themselves, could be considered simply innovative and desirable. He lacked the technical ability to carry it out. He knew or assumed the plan would be rejected if he shared the details or sought approval from Joslyn or Klimchak. Based on what he knew at

[3] The Union makes specific and general due process arguments. To the extent they are not specifically addressed in the discussion of individual charges, they are addressed more generally elsewhere in this Opinion and Award.

the time, he gambled that DS Joslyn did not have the time, desire or expertise to look closely at his operations and that Ms. Klimchak would not likely discover the details of the modifications because of distance and the state-wide scope of her responsibilities. Had there been no allegations about improperly sharing food with inmate workers, the computer changes might never have been detected.

Among other defenses, the Union asserts: "...to the extent that Grievant allowed modifications or made modifications to the library computers, notice of the cited rules is critical because Grievant's actions were well-intentioned: the goal was to preserve library data and enhance library efficiency..." [Union Brief at 12]

The Union also urges a finding that "[w]here an employer prohibits certain improvements to the workplace (like creating a back-up computer drive with the assistance of a worker), it is unreasonable for an employee to assume that he needs permission or that the act is *per se* misconduct." [Union Brief at 13.] Among others, the problem with this assertion is foundational. It presumes improvements are prohibited without any evidence to suggest any prohibition. Indeed, the relevant directive, in its own terms, contemplates requests for approval to make improvements. Stated simply, there was nothing to prevent Grievant from sharing his plans with supervision, how he would execute them and the extent to which he planned to involve inmates. Expecting an unsatisfactory answer from his superior does not operate to relieve him of the duty to follow the rules.

It strains all credulity to conclude that Grievant was unaware of the rules and policy directives.

If Grievant had difficulty formulating a defense, it is not because the allegations in the NOD dated back nine (9) months or that some specifications lacked a specific date. It is because he deliberately and without his supervisor's knowledge or authorization gave Inmate Johnson extraordinary access and means to make fundamental changes to the library's network that Grievant did not fully understand and, accordingly, could not possibly properly observe, monitor, scrutinize or fully describe. Once he gave Johnson this ability and control he cannot use his ignorance about technical details to shield himself from disciplinary action. Johnson became Grievant's agent, making Johnson's actions properly imputed to Grievant.

First, on a purely textual level – with the arguable exception of 2.36 - there is no real question that each bulleted allegation, if proved, represents a violation of State rules either by direct acts or by rendering himself incapable of adhering to them due to the scope of control already turned over to Inmate Johnson:

> 2.2 "An employee shall not knowingly…violate…any rule…or directive of the Department…"
>
> 2.35 "No employee shall add or delete any software in any Department computer without the written permission of the Superintendent…or his or her designee."
>
> 2.36 "Every employee, while on duty, shall devote all his or her time and effort to the performance of their duties. Each employee shall maintain an attitude and posture of alertness at all times. When supervising inmates, an employee shall not allow his or her attention to be diverted in any way that interferes with the maintenance of supervision."
>
> 8.4 "Employees must be constantly alert to detected inmates hiding or engaged in other improper activities…"
>
> 14.2 "All employees shall examine thoroughly and personally the entire area over which they have supervision after the inmates have left at the end of the program module or work assignment. Any breaches of security or risks thereto and any fire or safety hazards shall be reported immediately to the officer in charge."
>
> 14.3 "The responsible employee to whom inmates assigned for work…shall comply with…facility rules…and regulations governing operations of these areas."
>
> Directive #2810 – Information Security Policy IV. Security (A)(1) All requests for new…software…must follow DOCCS standard process…; (7) [o]nly properly licensed software that has been authorized by ITS may be installed…; (10) No programs or applications are to be developed and placed into production without the written approval of ITS as detailed by DOCCS Directive #2821, "Requesting Applications Modification/New Development."

Based on the record developed in these proceedings, Grievant is guilty of Charge 3 by a preponderance of the evidence.

Charge 4

During the month of September 2015, while on duty at the Mid-State Correctional Facility, you failed to maintain proper tool control in violation of Sections 2.2, 8.4, 14.5 and DOCCS Directive #4930, "Tool Control". Specifically, you allowed inmates in the library to gain access to cd's from the Mid-York system which were used to add and/or change computer programs.

The relevant rules state, in pertinent part:

> 8.4 "Employees must be constantly alert to detected inmates hiding or engaged in other improper activities…"
>
> 14.5 "Employees supervising work…areas will take every precaution to assure that all tools…are properly accounted for at all times and that an accurate inventory of such items is maintained."
>
> Directive #4930 – Tool Control. [S-3] "IV(C) "…Class "A" Tools…Allowable cd/dvds and disks as approved by the Deputy Superintendent for Programs…." VI ISSUING OF TOOLS (A)…Class "A" tools are issued only by employees. When used by inmates, they must be under employee supervision at all times. This means that the employee who issues the tool(s), or some other supervising employee must escort the inmate(s) with the tool(s) to the work site and remain in the vicinity where the tool is being used."

The State argues, *inter alia*, that it has established guilt through the testimony of Ms. Klimchak, who discovered the unauthorized Linux and Java software, Inmate Johnson, who testified he installed it with Grievant's permission and Grievant's testimony, including but not limited to his testimony that he had no knowledge of the Java software installation.

The Union argues, *inter alia*, that the charges are too vague and, accordingly, should be dismissed as a matter of procedural due process. The Union notes that Charge 4 does not specify the exact programs, the name(s) of inmates, how they got access or at what times of day or what duration they were possessed by inmates.

There is no dispute that Grievant is under duty to directly supervise and monitor inmates when they are assigned to work in the library. Books, with and without accompanying CDs, are delivered to the library in locked bags. Grievant has testified that his responsibility requires he unlock the bags, inspect the books for content, including checking for CDs and, when he finds a CD, to remove it and secure it in a locked cabinet. All of these actions are consistent with Rule 14.5. The Directive is also emphatic about handling and supervising the use of Class A Tools. "Employees supervising work…areas will take every

precaution to assure that all tools…are properly accounted for at all times and that an accurate inventory of such items is maintained." Directive #4930 – Tool Control

The baseline for analysis begins with Ms. Klimchak's testimony. She credibly testified that none of the programs -- Linux, Java or music files, existed on the local network computers when she configured it herself.

It is already well-established in the instant proceedings that Grievant sought, with Inmate Johnson's assistance, to make a number of significant changes and/or additions to the library's computer network. Grievant described these changes as improvements that would make the library function more efficiently but they remain, nevertheless, significant. Grievant has testified that Johnson had programming skills far superior to Grievant's and used Johnson's skills to, among things, create a Microsoft Access database. Inmate Johnson has given credible testimony he installed Linux and Java in furtherance of his work on the library's network and got the CDs from Grievant.

The Union's argument for dismissing the charge ignores the context. The instant charge is not focused on the impropriety of installing a particular type of unauthorized or even authorized software. The charge is safety-related.

In this context, lack of knowledge is not a defense. It is undisputed that there is no Internet connection available to anyone in the library. The only known way to add programs beyond (Klimchak's) configuration – based on the record developed in these proceedings - is to manually install them via loading software with a CD. Because there is no dispute about Grievant's duty to search, discover and secure CDs and, in the absence of any other employee who shared the responsibility, – none here - Grievant's failure to properly inspect a book, identify and then secure a CD is proved by its installation by an inmate. The only logical conclusion that can be drawn is that each program not a part of Klimchak's configuration was made by the Grievant or an inmate.

In this case, the credible evidence shows Inmate Johnson installed Linux and Java. Grievant testified he was not aware that at least one program – Java – was installed on any library computer. Even assuming it was permissible to install it, Grievant cannot describe how, by whom or for how long the program took to be installed. He cannot say he physically placed it or watched it being placed into a CD drive. He cannot say how long he observed or

from what position he monitored Johnson during its installation. This is in direct violation of the plain language of Directive #4930: "When used by inmates, they must be under employee supervision at all times. This means that the employee who issues the tool(s), or some other supervising employee must escort the inmate(s) with the tool(s) to the work site and remain in the vicinity where the tool is being used."

There is one exception. Johnson specifically testified he ordered the Linux book from Mid-York which contained a CD. Johnson stated that Grievant kept the Linux CD and put it in the machine for Johnson. Referencing Linux, Johnson volunteered during his testimony "all it takes is a C.O. to see me with a CD and it's big trouble I didn't want". In this instance, Grievant appears to have followed the standard protocols, at least the ones related to closely supervising an inmate when the use of a CD is involved.

In short, more than a preponderance of evidence shows that Grievant failed to properly secure, account for and handle CDs, "Class A" tools.

For the foregoing reasons, Grievant is guilty of Charge 4 by a preponderance of the evidence.

Charge 5

As the Union states "[t]here is not dispute that Grievant authored and sent a letter to Mr. Myers. [S-19] [Union's Brief at 14]

The Union is correct about two defenses to the instant Charge. First, a close reading of Rule 2.15 – without more explanation or history of the rule's enforcement – does not appear to be applicable to the admitted conduct. In its own terms, it implies something more than personal communication. To find otherwise would call into question any number of innocuous interactions between inmates and staff. Second, there was insufficient evidence to support the allegation that the letter was drafted during actual work time. Grievant admitted writing the letter but testified he did so while on a break. Accordingly, there is insufficient evidence Grievant violated Rule 2.36.

As for the last rule cited, Section 8.16, the Union's argument – that it is "...quite fitting that a librarian would encourage an inmate to continue doing something constructive and rehabilitative in nature (such as writing a book)" - is not persuasive. [Union's Brief at

15]. A number of facts are persuasive that the admitted conduct amounts to exhibiting "undue familiarity" with an inmate, a violation of Section 8.16. There is no evidence in the record suggesting it is routine for staff to communicate with inmates via personal letter on a matter of no urgency. Grievant has no control over an inmate sharing the letter with others. Given its contents and the use of the facility's internal mail system in this manner, the letter can easily be interpreted – including by inmates – as a staff member having forged a special relationship with an inmate.

Second, Grievant's letter included soliciting an inmate to quote Grievant in a book an inmate was writing. "P.S. Please continue to write your story, *No Two Alike*. And please remember to credit me should you quote any of the above; or any of that which we spoke of in conversation regarding your story. Thank you." [S-19] To any reasonable person – much less an employee of a correctional facility – asking an inmate for personal recognition cannot be said to be "...designed to encourage...compliance with standards of inmate behavior and participation in rehabilitative programs."

For the foregoing reasons, Grievant is not guilty of violating Rules 2.15 or 2.36. He is guilty of violating Rule 8.16. Accordingly, Grievant is guilty – under Rule 8.16 - of Charge 5 by a preponderance of the evidence.

Charge 6

- You stated that you did not bring McDonald's food items for the inmates that work for you in the library.
- You stated you did not tell any correction officer that you had brought McDonald's food in for your inmate workers.

This is a distinct charge but is obviously connected to Charge 2.

The State urges a finding that Grievant's statements – characterized as admissions – during questioning by OSI on January 7, 2016 are inconsistent with testimony in the instant proceedings and should lead to a conclusion that he intentionally gave false statements during the OSI investigation and that his testimony in general should be rejected in favor of credible State evidence that establishes guilt of the charges.

Based on the evidence in the record, fully discussed, *supra*, there is no finding of guilt in Charge 2 for lack of preponderant evidence. While Grievant's prior statements under oath

are widely divergent from his testimony in the instant proceedings, making his testimony – at best – unreliable in many respects, the result in Charge 2 practically dictates a finding that Grievant is not guilty of Charge 6.

For the foregoing reasons, Grievant is not guilty of Charge 6.

Charge 7

For ease of reference, the Charge is repeated here, in its entirety:

On or about June 23, 2015, while on duty at the Mid-State Correctional Facility in the library, you failed to devote all your time to performing your duties in violation of DOCCS Employees' Manual, Sections 2.1, 2.36 and 6.1. Specifically, you devoted your time and used State equipment to type non-work related documents referencing "The World According to Bruce", "Quarterly Report" and "Letter of Appreciation" in which you made unprofessional and inappropriate comments and notations as well as inaccurate statements such as, but not limited to, "euthanizing troublesome inmates", "refusing to accept any horse shit", and "elicit Albany's awe and praise."

Here, the State argues that SI Oliver's testimony establishes guilt and that Grievant's admissions during the investigation and in the instant proceedings support the Charge.

The Union first argues that the State failed to specifically establish when the documents were authored and urges the charge be dismissed as untimely.

Article 33.5(h) – Timeliness – states, in relevant part: "An employee shall not be disciplined for acts, except those which would constitute a crime, which occurred more than one year prior to the notice of discipline…"

While the Union urges there is "…no proof that the Charge is timely…", SI Oliver gave testimony regarding his investigation and was subjected to lengthy direct and cross-examination. Oliver testified about his on-site investigation in significant detail, including viewing desktop screens, discovering and printing the documents referenced in the instant charge. [S-11, S-15, S19, S-20] He was subject to direct and cross-examination and was not asked to give any specific testimony about precisely how he determined the date of June 23, 2015. His testimony was credible. There are insufficient grounds to find the charge is untimely.

As already indicated, SI Oliver was a credible witness. He gave extensive, detailed testimony about the genesis, process and substance of his investigation. His testimony did

not appear rehearsed, was internally consistent, consistent with exhibits and with statements and admissions of other witnesses, including Grievant.

Also significant in this context are Grievant's statements during his interrogation. [S-12] It was not apparent he had any difficulty in early January, 2016 remembering authoring all but one of at-issue documents. [S-12 at 66-74] Regarding one - the letter appearing to be a recommendation from an inmate - Grievant was first asked if he knew who wrote it. He first replied "[t]his is another stress release"; then, when asked if he wrote it, Grievant replied "I don't know. It's been quite a while. It looks like something I wrote to relieve stress. [S-12 at 73] He then went on to explain what he meant when he used the term "stress release", stating "[y]ou work a job where you don't feel like you're appreciated or that – or a sense of accomplishment, so sometimes just for sarcastic humor, I guess, for lack of a better phrase." Rather than disclaiming the letter, he specifically recalled that Inmate Johnson was not present when Grievant wrote it. [S-12 at 74]

The relevance of this exchange concerns the generally accepted reason for timeliness provisions like Article 33.5(h) – to permit an accused employee an ability to mount a competent defense to a misconduct charge. The absence of specific dates did not operate to prejudice to his defense or amount to a deprivation of due process rights under the collective bargaining agreement. Grievant repeatedly claimed that his memory of events was better during the arbitration hearing than it was at the time of his interrogation. There is no evidence to suggest that SI Oliver reached back more than nine (9) months from the date of the NOD. Accordingly, based on the entire record and the parties' collective bargaining agreement, the charged conduct is timely within the meaning of Article 33.5(h).

Having resolved the timeliness issue, the State failed to show that Grievant created the documents at a specific time of day. Grievant denied writing them on work time, stating he wrote them before his tour of duty began, at lunchtime or while on another authorized break. There is no evidence to rebut the assertion. This is an obvious factual dispute and must, under ordinary evidentiary standards, be resolved in Grievant's favor.

The State did elicit an admission from Grievant that he used State equipment to create personal documents and, in one case, used State equipment to print out a one-page document. However, as the Union argues, the rule contemplates and specifically provides in Directive 2810 that "State Computers may be used for incidental, personal purposes…provided that

such use is in a limited amount and duration..." Based on a careful review, the time and duration of Grievant's personal use is not actionable misconduct because it falls within the exception in the rule.

The substance of the documents is the only remaining issue, particularly Grievant's "Quarterly Report" [S-11] which DS Joslyn characterized as potentially offensive to inmates. Even Grievant acknowledged that using words such as "euthanizing", referring to inmates, could be offensive to them– despite his characterization of the substance as "satirical."

Grievant's best defense was no longer available to him when he permitted Inmate Johnson to alter the library's computer network, one consequence of which – regardless of intention - was to permit inmates access to documents which originated and were stored on Grievant's computer. The Union cannot successfully argue that Grievant's writings were private or could not be seen by inmates and cannot claim the documents were protected from discovery by network and password restrictions at other workstations. They were not.

Based on the record developed in these proceedings, the Grievant is guilty of improperly using State equipment for storing personal documents. He is not guilty of improperly using state equipment on work time.

For the foregoing reasons, Grievant is guilty of Charge 7, to the extent indicated.

The Union raises a number of procedural and substantive objections, applying a just cause analysis, urging that the Charges be dismissed. Some objections are discussed elsewhere in this Opinion and Award.

The Union argues that Grievant's first written statement in the earliest stage of the instant matter [S-23] should be rejected despite the presence of union representation, because of lack of proper notice and lack of appropriate, standard pre-statement warnings. Here, the Union is correct. The State must have known that the statement from C.O. Pynckel regarding December 24, 2015 could easily lead to disciplinary action against Grievant. The report involved Pynckel's observation of contraband fast food in a library where the only civilian employee was the Grievant and, according to Pynckel's report, included Grievant's clear admission against interest. The receipt of the report started a chain reaction of investigative work. The State had to have believed that if it confirmed Pynckel's report, Grievant would almost assuredly face disciplinary action. If there were any doubt that the State had already

viewed Grievant as a target on the day he was required to write a statement, the printed questions resolve it. He was asked about bringing food into the facility and whether he shared it with inmates and was asked for his computer password. For all of these reasons, S-23 is not considered in making any determinations in the instant case.

The interrogation itself, however, included appropriate pre-questioning notice and union representation. [S-12] Grievant was made aware of the interrogation in advance. A union representative was present, including Grievant being given an opportunity to consult with the representative during the interrogation; he was verbally informed of his rights and responsibilities before being questioned; he was given an opportunity to ask questions; he stated he understood these rights. [S-12] There is no relevant authority cited for an interpretation of Article 33.3(a)[4] that calls for the State to suspend questioning until the employee is able to summon the specific union representative he prefers.

The Union also argued that the Grievant lacked proper notice of the State's rules, despite evidence he signed for receipt of the Employees' Manual. Although the Union urges a finding that the State was under a duty to essentially test Grievant's knowledge and understanding of the rules, the rules themselves clearly state that employees are responsible for reading and understanding them. Notably, Grievant is a librarian by training who holds an Associate's, Bachelor's and Master's Degree. It was not unreasonable for the State to expect Grievant to read the rules and ask questions if he was not certain how to interpret them. As for the Security Directive [S-4] which the Union claims should not be considered because there is no evidence Grievant received it, the evidence in this record makes it clear that Grievant understood the restrictions under which he was operating. Based on the credible evidence in the record, he knew enough to ask Inmate Johnson to minimize a screen if a staff member walked into the library while Johnson was using Microsoft Word. It defies all logic to conclude he was not also aware that downloading software and operating systems,

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[4] Article 33.3(a) states, in relevant part:

Employees may represent themselves or be accompanied for purposes of representation by PEF at meetings or hearings held pursuant to the disciplinary procedure set forth in Section 33.5 and when...the employee is required to submit to an interrogation or requested to sign a statement. Unless the employee declines representation, a reasonable period of time shall be given to obtain a representative.

granting Administrator privileges to an inmate and permitting the creation of a new database by an inmate were prohibited without supervisory authorization. I also note that the Directive is not the only source of rule-based prohibitions involving information technology. Section 2.35 of the facility's Manual states: "No employee shall add or delete any software in any Department computer without the written permission of the Superintendent...or his or her designee." Accordingly, the record establishes that Grievant had adequate notice of rules relevant to the instant matter.

There is no evidence that the cited rules are unreasonable. It is almost unnecessary to be reminded of the context in which they were promulgated. On their face, most are safety related and designed to protect the Grievant as much as any other person inside or outside of the facility. Grievant has been employed by DOCCS for 13 years and has worked in facility libraries since he joined State service. If he believed the rules were unreasonable he has had many opportunities to ask that they be modified.

Testimony from SI Oliver, DS Joslyn, Ms. Klimchak all described an extensive investigatory record that included interviews with approximately a dozen individuals, including two colleagues who saw and spoke with Grievant on December 24, 2015, Inmate Johnson and other inmates who worked in the library. Ms. Klimchak looked at the entire network system set-up to determine to extent to which it was altered from the way she herself configured it. There is no deficiency in this investigation that would justify a finding of a lack of due process.

The preparation of a charge in an NOD that is closely aligned with the earliest incident reports does not, by itself, destroy the objectivity of the investigation. There is no evidence that the State put any pressure on any witness or failed to pursue a relevant line of inquiry. In fact, the first two reports from colleagues – similar in nature and largely consistent with one another – were entirely unsolicited. Neither colleague was shown to have any motive to fabricate their accounts.

Finally, there is no evidence in the record that an employee similarly situated to Grievant as to tenure, employment record and conduct was treated better or differently than he was.

Conclusions and Penalty

1. Is there just cause to discipline Bruce Thompson for the charges contained in the Notice of Discipline dated January 20, 2016?

As already indicated, there is ample evidence that establishes Grievant's guilt as to Charges 1, 3, 4, 5 and 7.

As already discussed elsewhere in this Opinion and Award, the State's investigation was fair, thorough and timely. There is no evidence of an improper use of post-hoc evidence used to support its initial decision to prefer charges. Grievant had a full and fair opportunity to give his version of events during his interrogation. There is no evidence of an employee similarly situated to Grievant who was treated differently or better than he was.

As discussed, supra, there was not sufficient preponderant evidence of Grievant's guilt regarding Charges 2 and 6.

In sum, there is just cause to discipline Grievant for the proved, sustained misconduct/incompetence described above in Charges 1, 3, 4, 5 and 7.

2. If there is just cause, is the proposed penalty of termination appropriate? If not, what is the appropriate penalty, if any?

The State has argued throughout these proceedings that it cannot tolerate breaches of rules and regulations rooted in safety and security. More specifically, the State asserts in its brief that Grievant has been found guilty of inappropriate or overly familiar conduct with inmates, one involving food gifts and the other a personal letter to an inmate using the intra-facility mail system. In the State's view, Grievant "crossed a line" and "caused irreparable damage to the trust that the Department must place in all its employees to interact with inmates in a professional and appropriate manner." [State's Brief at 20]

The State asserts Grievant's record of employment adds further justification for upholding a discharge penalty. It points to an April 25, 2014 NOD [S-28] "for failing to interact with supervisors in an appropriate and/or professional manner." [State's Brief at 21] This NOD, originally seeking a penalty of a 30-day suspension, was settled with Grievant forfeiting three (3) accrued personal leave days.

It offers prior decisions in support of a discharge penalty.

PEF and DOCCS (Prosper 2008), involved and employee who allowed an inmate inappropriate access to a State computer and conducted personal business during work hours. The arbitrator wrote, in part, "...Asking an inmate for assistance in constructing programs is serious. Permitting an inmate to build a personal business website is serious." In upholding the penalty of discharge, the Arbitrator found that despite the Grievant's tenure and lack of prior discipline, the misconduct fell outside the bounds of ordinary progressive discipline.

> "In the Department of Corrections, security breaches caused by inappropriate relationships fall into that category of first-offense termination offenses. The fact is that the safety of the prisoners, the guards and civilian employees as well as the general public is placed at risk when a security violation exists...This is why the State has an established practice of zero tolerance for such misconduct...evidenced by the many arbitration decisions...directly on point showing termination, in the first instance, for misconduct involving employees developing personal relationships with prisoners."
>
> *CSEA and DOCCS, Case No. 27-DIS-148* (Lewandowski).

DOCCS and PEF (Battisti) involved a civilian teacher who brought 28 plastic baggies of candy and holiday pencils for student/inmates. Discharge was upheld despite 16 years of service and no prior disciplinary action. The arbitrator held that "...teachers in the prison environment must have the presence of mind to realize that teaching inmates in a maximum security correctional facility is a world apart from teaching students in civilian schools. Incarcerated inmates have been convicted of serious felony offenses and must be considered to be capable of committing further dangerous and harmful acts if given the materials and opportunities to do so."

The State also notes that Grievant has been formally counseled for inappropriate conduct in the presence of inmates [S-27], making disparaging remarks about colleagues in the presence of inmates and for making phone calls about his private email in the presence of inmates. [S-26]

The Union urges that the collective bargaining agreement specifically recognizes "...the importance of counseling and the principle of progressive discipline." Article 33.3. The Union notes that Grievant has been employed by the State for 13 years, was promoted early in his tenure and has clearly stated in the instant proceedings that he will never again

give food to inmates and will get permission from his superiors before making any modifications to the library's computer system.

The Union also cites to prior cases to support its argument that principles of progressive discipline are appropriate even where an employee has a significant disciplinary record.

In *DOT and PEF* (Pewtherer 2012) the arbitrator determined that a penalty of a lengthy time-served suspension was appropriate despite a significant history of prior discipline, including a permanent transfer 87 miles from Grievant's home. In DOCCS and PEF (Gelernter 2010) the Arbitrator imposed a six (6) month suspension notwithstanding two prior disciplinary actions where arbitrators imposed discipline.

Where a "relatively minor" offense was preceded by "an atrocious" disciplinary record including five (5) prior NODs, the arbitrator modified the proposed discharge penalty to a 45-day suspension. *DOCCS and PEF* (Crangle 2006)

I have carefully reviewed the evidence, arguments and Grievant's past record. From the outset, it is plain that both the State and the Union took great care in presenting evidence and fashioning arguments. There are few, if any, gaps in understanding what was expected of Grievant and what occurred.

As the Union points out, the collective bargaining agreement is direct in calling for the application of "progressive discipline" and includes a specific recognition of "just cause" principles in the processing and adjudication of disciplinary matters. The root of both terms of art are many decades old and their meaning continues to be the subject of academic debate and discussion. In hundreds, perhaps thousands, of cases the parties to this collective bargaining agreement have a developed line of arbitral awards that give definition to those terms. The analysis here depends in large measure on understanding and applying these standards in the context of Article 33.

With this in mind, the State's reliance on past counseling is mainly relevant to establish notice. The collective bargaining agreement makes plain that "counseling" is not discipline. This does not mean that the Grievant's prior record of counseling is irrelevant. It does mean that it is not considered in determining an appropriate penalty.

Prior decisions cited by the State are, for the most part, applicable here. DOCCS is one of many State agencies whose employees are covered under this collective bargaining

agreement and there is no dispute that its mission is distinct from any other and its rules are distinct from others in order to fulfill its mission. As a paramilitary organization with the responsibility for the safety of inmates, staff and the public, its lack of tolerance for certain types of misconduct has led arbitrators to impose discharge penalties in the first instance for long-term employees with no meaningful disciplinary record. Caselaw cited by the State confirms it.

A part of the analysis is the impact or potential impact of the proven misconduct. Here, the State has repeatedly stated that the Grievant's misconduct has destroyed the essential trust that is required to work in this environment.

The Union makes a diligent attempt to minimize the significance of Grievant's conduct, relying heavily on the fact that there is no evidence that any individual – inmate, staff member or member of the public – was harmed. Specifically, the Union argues that there is no evidence that any inmate ever saw the "Quarterly Report", "The World According to Bruce" or the "Letter of appreciation" and, accordingly, any penalty associated with them should not result in discharge. The argument goes to impact but implicit in the seriousness of the misconduct is that it is not limited to actual disclosure. As the State has shown through credible testimony from experienced corrections professionals, authoring and storing these types of documents and – due to the intentional security breaches that were part and parcel of Grievant's collaboration with Inmate Johnson - pose a daily risk that any inmate with access to any library computer could, if desired, access and view them.

The Grievant's proven disregard of safety rules regarding the proper handling and safeguarding "Class A Tools" is also a part of the State's reason for considering Grievant untrustworthy. This requires little, if any, further explanation.

The record evidence shows that the extraordinary access granted to Inmate Johnson to make alterations to a DOCCS computer system, print documents and invent user IDs, compromised the safety and security of inmates, colleagues and himself. As SI Oliver testified, Grievant made it possible for Johnson to do what another inmate had done: create false documentation intended to accelerate his release from incarceration. The fact Johnson did not take this type of action does not change the risk.

The most striking fact is not simply the unauthorized nature of system changes and handling of CDs. It is the magnitude, effort and trust-relationship that had to have been nurtured and preserved between a civilian employee and an inmate. It permitted them to achieve the changes and included from the beginning a willingness of both to assist the other in concealing their activities. The fact that Grievant did not appear to appreciate the inappropriate nature of this relationship or its potential danger to himself or others calls his judgment into serious question. The State has very legitimate concerns about its ability to trust Grievant in any role in the facility, whether with or without an inmate "staff" to supervise.

For the foregoing reasons, the penalty of discharge is appropriate for the proven misconduct irrespective of Grievant's tenure and disciplinary record.

3. Did DOCCS have probable cause to suspend Grievant effective January 12, 2016?

The Union argues that DOCCS failed – as a matter of procedure and substance – to establish grounds for suspension within the contractual limitations of Article 33.4(a)(1) [J-1].

Subsection (a) (1) preserves the right of the State to suspend when, in its discretion, it makes a determination of probable cause that "...such employee's continued presence on the job represents a potential danger to persons or property or would *severely* interfere with operations..." [italics added] This provision has been in the collective bargaining for decades. It was modified in 1995 to add "severely". *See, PEF and OMRDD* (Sunmount DDSO) (Denenberg 1997). With some narrow exceptions, not applicable here, the State bears both a duty of production and persuasion - on a probable cause standard - independent of proving the underlying misconduct in the charges, even where discharge is an appropriate penalty at the conclusion of the grievance process.

Here, the Notice of Suspension [J-2] states: "Reason for suspension: inappropriate and unauthorized dealings with inmates."

The State specifically requests that the undersigned "...take note of the testimony of SI Oliver and DSP Anne Joslyn's in support of the probable cause for Grievant's suspension." [State's Brief at 19] The State highlights SI Oliver's testimony, explaining his knowledge of a previous case – not involving the Grievant – where an inmate was discovered

to have created and sent false release papers to a family member who attempted to use them to support the inmate's release from custody. It also highlights DS Joslyn's testimony – "By giving the inmates the food items described in this case Grievant crossed a boundary and can no longer be trusted." [State's Brief at 20]

The Union cites to a number of prior awards, including *PEF and DOCCS* (Moskowitz, 2015) to support its claim of an improper suspension. Arbitrator Moskowitz concisely describes an essential element to establish probable cause:

> "...in determining whether probable cause was given for the suspension without pay, an arbitrator may only look at the facts set forth in the Superintendent's reason to see whether they meet the standard for probable cause...[and]...does not have the luxury of reviewing facts adduced and developed in full at the hearing itself."

Prior interpretations of Article 33.4, like the one above, are highly persuasive in determining the facts relevant to a determination of whether the suspension here should be upheld. There is no compelling justification to significantly depart from them. The testimony of SI Oliver and DS Joslyn is relevant in addressing the impact or potential impact of proven misconduct but based on prior interpretations of Article 33.4, it may not be considered to support the initial suspension.

The Union points directly to the notice of suspension itself, which indicates "inappropriate and unauthorized dealings with inmates" and is completely silent regarding of whether or to what extent Grievant was a 'potential danger' or how his continued employment during the pendency of these proceedings would 'severely interfere with operations.'

As noted, prior arbitration awards on this subject are consistent and clear. Based on the evidence in the record, the State failed to establish probable cause to suspend Grievant effective January 12, 2015. Accordingly, Grievant is entitled to make whole relief for the period of his suspension through the date of this Opinion and Award.

Award

The grievance is granted in part and denied in part

1. Grievant is guilty of Charges 1, 3, 4, 5 and 7. He is not guilty of Charges 2 and 6. Accordingly, there is just cause for discipline for Charges 1, 3, 4, 5 and 7. There is not just cause for discipline for Charges 2 and 6.
2. The penalty of dismissal is appropriate.
3. The State did not establish probable cause to impose a pre-hearing suspension without pay on January 12, 2016. Grievant is entitled to full back pay and benefits from the first date of suspension through and including the date of this Opinion and Award. No other relief is due or warranted.

E. David Hyland
Impartial Arbitrator

State of New York)
) ss.:
County of New York)

I, E. David Hyland, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is my award.

Dated: January 17, 2017

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
BRUCE THOMPSON,
Petitioner,

DECISION AND ORDER
Index No.: 06586-17

For an Order Pursuant to CPLR Article 75,
Confirming an Arbitration Award,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION; and ANTHONY J. ANNUCCI as Acting Commissioner of NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,
Respondents.

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: Edward J. Aluck, Esq.
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Connolly, J.:

Petitioner seeks an order, *inter alia*, confirming the January 17, 2017 arbitration award of Arbitrator Hyland ("Award"). Respondents have cross-moved for an order partially vacating the award upon the grounds that the arbitrator exceeded his authority and rendered an irrational award.

Petitioner was employed by respondent New York State Department of Corrections and

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Community Supervision ("DOCCS") as a Senior Librarian at Mid-State Correctional Facility. Such position is in the Professional, Scientific and Technical Services ("PS&T") bargaining unit of State employees of which the New York State Public Employees Federation, AFL-CIO ("PEF") is the bargaining representative. PEF and the State entered into a Collective Bargaining Agreement ("CBA") governing the terms and conditions of employment for all PS&T unit members, including the Petitioner.

Petitioner was suspended without pay on or about January 12, 2016. DOCCS specified in a January 12, 2016 suspension notice that the reason for petitioner' suspension was "inappropriate and unauthorized dealings with inmates". Petitioner was issued a Notice of Discipline seeking his termination dated January 20, 2016.

The Notice of Discipline ("NOD") listed seven charges including, *inter alia*, that petitioner, in violation of DOCCS' employee rules: (i) inappropriately gave inmates food which had been brought into the facility in violation of DOCCS' employee rules; (ii) demonstrated undue familiarity with inmates by providing McDonald's food without authorization in violation of DOCCS' employee rules; (iii) installed unauthorized computer software, allowed and/or failed to recognize that an inmate engaged in unauthorized computer programming activities, modified or allowed permissions for client computers to be modified by an inmate, changed or allowed to be changed the inmate clerk computer user privileges to "Administrator", allowed or enabled the development of a separate interlibrary loan database program which was created by an inmate and was password protected, modified or allowed to be modified the computer disaster recovery plan by creating a shadow drive; (iv) failed to maintain proper tool control specifically allowing inmates in the library to gain access to cd's from the Mid-York system which were used to add and/or change computer programs; (v) communicated with an inmate without authorization specifically sending a letter to

an inmate through inter-facility mail; (vi) provided false information to investigators; and (vii) failed to devote all of his time to performing his duties, specifically using State equipment to type non-work related documents in which unprofessional and inappropriate comments and notations as well as inaccurate statements were made.

Pursuant to Article 33 of the CBA, petitioner filed a disciplinary grievance and demanded arbitration. Arbitration hearings were held on September 7, 8 and October 18, 2016.

The following issues were presented to the arbitrator for determination:

1. Is there just cause to discipline Bruce Thompson for the charges contained in the Notice of Discipline dated January 20, 2016 ("Issue 1");
2. If there is just cause, is the proposed penalty of termination appropriate? If not, what is the appropriate penalty, if any? ("Issue 2")
3. Did the State's suspension of Grievant on or about January 12, 2016 meet the standard established under Article 33.4 of the parties' collective bargaining agreement and, if not, what shall the remedy be? ("Issue 3")

The Award granted in part and denied in part petitioner's grievance. As to Issue 1, the arbitrator found petitioner guilty of NOD charges 1, 3, 4, 5 and 7 but concluded that DOCCS lacked sufficient evidence of petitioner's guilt as to charges 2 and 6. As to Issue 2 (concerning the appropriateness of the penalty), the arbitrator found the penalty of discharge appropriate. As to Issue 3 (suspension without pay) however, the arbitrator determined that respondents did not have probable cause to suspend petitioner without pay prior to the arbitration as the notice of suspension is "completely silent regarding of whether or to what extent Grievant was a potential danger or how his continued employment during the pendency of these proceedings would severely interfere with operations" (Award, pg. 43). The arbitrator determined that prior arbitration awards had held that he was limited in making such determination to the facts set forth in the suspension notice of January 12, 2016 which solely provided "Reason for Suspension: Inappropriate and unauthorized dealings with inmates".

Petitioner seeks confirmation of the Award and an order of the Court, *inter alia*, (i) directing

respondents to immediately correct petitioner's employment record to show that he was not suspended, and the wrongful suspension, from January 12, 2016 through January 17, 2017, was not upheld by the Arbitrator's award; (ii) returning and reinstating petitioner to the payroll and making him whole with full pay and benefits from January 12, 2016 through January 17, 2017; (iii) directing that respondents immediately pay petitioner his back pay from January 12, 2016 through January 17, 2017; (iv) granting petitioner interest upon the amount of his full pay and benefits from January 12, 2016 through January 17, 2017 and statutory interest from January 17, 2017 until the date when respondents fully implement the award and satisfy the order and judgment herein requested, fully correct petitioner's employment record, make petitioner whole with full pay and benefits; and (v) awarding petitioner the costs, fees, interest and disbursements of the proceeding.

Respondents do not oppose confirmation of the Award as to Issues 1 and 2 but seek partial vacatur of the Award with respect to the arbitrator's determination as to Issue 3 on the grounds, *inter alia*, that the arbitrator exceeded his authority by modifying the terms of the CBA with respect to the requirements for suspension notices and the evidence that may be considered during arbitration to determine whether an employer had probable cause to suspend its employee at the time of suspension.

Standard

"Collective bargaining agreements commonly provide for binding arbitration to settle contractual disputes between employees and management. In circumstances when the parties agree to submit their dispute to an arbitrator, courts generally play a limited role. Courts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of

overseers to conform the award to their sense of justice. Despite this deference, courts may vacate arbitral awards in some limited circumstances. A court may vacate an award when it violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power under CPLR 7511(b)(1)" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326, [1999] [internal citations omitted]; *see also Union-Endicott Cent. Sch. Dist. v Peters*, 123 AD3d 1198, 1200-1201 [3d Dept 2015], lv dismissed and denied 25 NY3d 964 [2015]). "Although an arbitrator's interpretation of contract language is generally beyond the scope of judicial review, where a benefit not recognized under the governing CBA is granted, the arbitrator will be deemed to have exceeded his or her authority" (*Virginia Livermore-Johnson v DOCCS*, 155 AD3d 1391 [3d Dept 2017][internal citations and quotations omitted]).

Pursuant to Article 33.4 (a) (1) of the CBA, "[t]he appointing authority ... may, in his/her discretion, suspend an employee without pay or temporarily reassign him/her when a determination is made that there is probable cause that such employee's continued presence on the job represents a potential danger to persons or property or would severely interfere with operations". A NOD is to be served no later than five (5) calendar days following such suspension. The CBA also provides that where an employee is suspended without pay or temporarily reassigned, and the hearing will extend beyond one day, "either party may authorize the arbitrator to issue an interim decision and award solely with respect to the issue of whether there was probable cause for the suspension or temporary reassignment, such request to be permitted at any time after the completion of the State's direct case" (CBA, Art. 33.4(c)(3)).

The Third Department in *Virginia Livermore-Johnson v DOCCS*, *supra*, held that an arbitrator exceeded his authority where he imposed additional requirements into a collective

bargaining agreement by determining that he was bound by the language of the suspension notice as to whether probable cause existed and that he could not review the facts developed at the hearing. The Third Department held that was an "irrational interpretation of the CBA", holding that the relevant collective bargaining agreement's language concerning the suspension notice, which is the same language in the CBA at issue herein, did not require the suspension notice to include support and a detailed reasoning for its probable cause determination (*see Id.* at 1393) and that the collective bargaining agreement at issue in such case, "by permitting an arbitrator to rule on the propriety of an interim decision and award only after DOCCS has completed its direct case, indicates that such hearing evidence will be considered by the arbitrator in determining whether the employer established probable cause for an employee's suspension." (*Id.* at 1394).

While, in *Livermore-Johnson*, an interim award had been requested and made, and an interim award is not at issue herein, the determinations of the Third Department are applicable particularly as the relevant language of the CBA at issue mirrors that of the collective bargaining agreement in *Livermore-Johnson*. The CBA at issue does not require a suspension notice to be in writing and provides that an interim decision may be requested concerning probable cause, however such request is permitted at any time after the completion of the State's case.

In this case, the arbitrator irrationally interpreted the CBA by finding that he was bound by the language of the suspension notice as to whether probable cause existed and could not review the facts developed at the hearing. Further, the arbitrator exceeded his authority by adding new requirements to the CBA requiring the language of the suspension notice to establish probable cause, limiting such determination (as to whether the State's suspension of Grievant on or about January 12, 2016 met the standard established under Article 33.4 of the parties' collective bargaining

agreement and, if not, what the remedy should be) to the language of the suspension notice and refusing to consider any hearing evidence submitted by DOCCS to determine whether probable cause existed for petitioner's suspension.

Accordingly, the arbitration award rendered on January 17, 2017 is confirmed with respect to the finding of guilt and appropriateness of the penalty and is hereby vacated solely with respect to the determination concerning Issue #3 (regarding petitioner's suspension). The matter is remitted to Arbitrator Hyland solely with respect to Issue # 3 for a determination consistent with this Decision and Order.

Based upon the foregoing, neither party has demonstrated their entitlement to costs, fees or disbursements. Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED that the petitioner's motion to confirm the Award is granted solely as to the arbitrator's determination as to the determination of guilt and the appropriateness of the penalty (i.e. Issues 1 and 2), and such further requested relief is in all other respects denied; and it is further

ORDERED that the respondents' cross-motion to partially vacate the Award as to the determination of Issue 3 is granted and the matter is remitted for determination as to Issue 3 within sixty (60) days of the date of this Decision and Order in a manner consistent with this Decision and Order, and such further requested relief is in all other respects denied.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the respondents. The below referenced original papers are being mailed to the Albany County Clerk. The signing of this Decision and Order shall not

constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry or notice of entry the Albany County Clerk.

SO ORDERED.
ENTER.

Dated: March 30, 2018
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition dated October 5, 2017; Verified Petition dated August 28, 2017 with accompanying exhibits A-D; Brief on Behalf of Petitioner;
2. Notice of Cross-Motion to Partially Vacate Arbitration Award dated December 27, 2017; Verified Answer dated December 27, 2017; Affidavit of John A. Shipley dated December 22, 2017 with accompanying exhibits A-H; Memorandum of Law in Support of Respondents' Answer and Cross-Motion to Partially Vacate Arbitration Award;
3. Verified Reply dated January 29, 2018; Petitioner's Reply Memorandum of Law dated January 29, 2018.

In the Matter of the Arbitration

Between

The PUBLIC EMPLOYEES' FEDERATION, AFL-CIO (Re: Bruce Thompson, Grievant)

Union

and

STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Employer

Disciplinary Grievance Arbitration

Case No. AAA 01-16-0000-2993

Appearances:

FOR the Public Employees' Federation
Lisa M. King, Esq.
by David J. Friedman, Esq., Of Counsel

FOR the State of New York, Department of Corrections and Community Supervision
Matthew Bloomingdale, Deputy Director, Bureau of Labor Relations

AMENDED OPINION AND AWARD

The undersigned issued an Opinion and Award in the above captioned case dated January 17, 2017.

On or about August 28, 2017 the Union brought an action in New York State Supreme Court to confirm the above referenced Opinion and Award, specifically that part which awarded Grievant back pay based upon a finding that the State failed to meet the standard of review of Article 33.4(1) of the collective bargaining agreement when it imposed a pre-arbitration

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suspension without pay. The State cross-moved to vacate that portion of the award regarding back pay.

In a separate matter, in November 2017, the Appellate Division, Third Department, issued its decision in *Livermore-Johnson v. DOCCS*, 155 AD3d 1391 [3d Dept 2017]. The Supreme Court in *Thompson v DOCCS*, Index No. 06586-17, focused significant attention on the analysis in *Livermore-Johnson*:

> "The Third Department in *Virginia Livermore-Johnson v DOCCS, supra*, held that an arbitrator exceeded his authority where he imposed additional requirements into a collective bargaining agreement by determining that he was bound by the language of the suspension notice as to whether probable cause existed and that he could not review the facts developed at the hearing. The Third Department held that was an "irrational interpretation of the CBA", holding that the relevant collective bargaining agreement' s language concerning the suspension notice, which is the same language in the CBA at issue herein, did not require the suspension notice to include support and a detailed reasoning for its probable cause determination (see 161. at 1393) and that the collective bargaining agreement at issue in such case, "by permitting an arbitrator to rule on the propriety of an interim decision and award only after DOCCS has completed its direct case, indicates that such hearing evidence will be considered by the arbitrator in determining whether the employer established probable cause for an employee's suspension." (Id. at 1394)."
>
> "While, in *Livermore-Johnson*, an interim award had been requested and made, and an interim award is not at issue herein, the determinations of the Third Department are applicable particularly as the relevant language of the CBA at issue mirrors that of the collective bargaining agreement in *Livermore-Johnson*. The CBA at issue does not require a suspension notice to be in writing and provides that an interim decision may be requested concerning probable cause, however such request is permitted at any time after the completion of the State's case." *Virginia Livermore-Johnson v DOCCS*, 155 AD3d 1391 [3d Dept 2017] [internal citations and quotations omitted]).
>
> Accordingly, the arbitration award rendered on January 17, 2017 is confirmed with respect to the finding of guilt and appropriateness of the penalty and is hereby vacated solely with respect to the determination concerning Issue #3 (regarding petitioner's suspension). The matter is remitted to Arbitrator Hyland solely with respect to Issue # 3 for a determination consistent with this Decision and Order.
>
> Based upon the foregoing, neither party has demonstrated their entitlement to costs, fees or disbursements. Otherwise, the Court has reviewed the parties'

> remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.
>
> Accordingly, it is hereby
>
> ORDERED that the petitioner's motion to confirm the Award is granted solely as to the arbitrator's determination as to the determination of guilt and the appropriateness of the penalty (i.e. Issues 1 and 2), and such further requested relief is in all other respects denied; and it is further
>
> ORDERED that the respondents' cross-motion to partially vacate the Award as to the determination of Issue 3 is granted and the matter is remitted for determination as to Issue 3 within sixty (60) days of the date of this Decision and Order in a manner consistent with this Decision and Order, and such further requested relief is in all other respects denied."
>
> *Thompson v DOCCS, supra.*

Accordingly, pursuant to the Decision and Order in *Thompson v DOCCS, supra*, the undersigned hereby renders the following determination regarding Issue 3. It replaces the analysis of the January 17, 2017 Opinion and Award as to Issue 3 but, as the Court has already ruled, the remainder of the Opinion and Award is confirmed and in no way altered or amended.

OPINION AND AWARD – ISSUE 3

As the Court has instructed, the following analysis and determination are based on all of the record evidence. This includes findings of fact and guilt of five (5) of the seven (7) charges. Two (2) charges alleged Grievant 1) provided inmates with contraband breakfast food and 2) lied about it to investigators. Both were dismissed for lack of preponderant evidence.

The January 17, 2017 award summarized and characterized the evidence adduced at trial, including testimony from SI Oliver and DSP Joslyn:

> "As the State has shown through credible testimony from experienced corrections professionals, authoring and storing these types of documents and – due to the intentional security breaches that were part and parcel of Grievant's collaboration with Inmate

> Johnson - pose a daily risk that any inmate with access to any library computer could, if desired, access and view them.
>
> The Grievant's proven disregard of safety rules regarding the proper handling and safeguarding "Class A Tools" is also a part of the State's reason for considering Grievant untrustworthy. This requires little, if any, further explanation.
>
> The record evidence shows that the extraordinary access granted to Inmate Johnson to make alterations to a DOCCS computer system, print documents and invent user IDs, compromised the safety and security of inmates, colleagues and himself. As SI Oliver testified, Grievant made it possible for Johnson to do what another inmate had done: create false documentation intended to accelerate his release from incarceration. The fact Johnson did not take this type of action does not change the risk.
>
> The most striking fact is not simply the unauthorized nature of system changes and handling of CDs. It is the magnitude, effort and trust-relationship that had to have been nurtured and preserved between a civilian employee and an inmate. It permitted them to achieve the changes and included from the beginning a willingness of both to assist the other in concealing their activities. The fact that Grievant did not appear to appreciate the inappropriate nature of this relationship or its potential danger to himself or others calls his judgment into serious question. The State has very legitimate concerns about its ability to trust Grievant in any role in the facility, whether with or without an inmate "staff" to supervise.
>
> Opinion and Award, January 17, 2017 at 42-43.

In its post-hearing brief, the State urged that SI Donald Oliver's and DSP Anne Joslyn's testimony be considered sufficient evidence to support the suspension. It cited Oliver's testimony that Grievant allowed "...inmates free access to the computers in the library...[and] created a dangerous situation..." Oliver, as noted in the award, *supra*, recalled a prior case involving another employee and another inmate where the inmate used a computer to create bogus release documents which were mailed out of the facility. Oliver testified "...the potential that a similar act could occur demonstrates a very real threat to the security of any facility..." [State's Brief at 19]

The State also pointed to DSP Joslyn's testimony. She testified that inmates "...are extremely manipulative...[and]...when Grievant provided the inmates in this case with food items, he opened himself to manipulation and extortion...[and]...inmates may become upset if other inmates were to learn that some gift or privilege had been provided to other inmates but not to them..." The State also highlighted DSP Joslyn's testimony that Grievant's failure to safeguard CDs created a serious security risk..." [State's Brief at 19 – 20]

Even prior to the Appellate Division's decision in *Livermore-Johnson v DOCCS, supra,* the State was not necessarily bound to produce live testimony from the decisionmaker. There is no contractual bar to introducing hearsay. However, opinions and arguments relevant to penalty – untrustworthiness, among others – do not necessarily satisfy the burden of Article 33.4. "There must be some evidence that the Employer has some basis for believing that the employee's misconduct or incompetence will reoccur in the near future or some time before the arbitration process will be completed." *PEF and OPWDD* (Cooper, 2014) and "...a genuine likelihood of harm to clients, property or the functioning of the agency if the employee remained on the job." *PEF and OMRDD* (Sunmount DDSO) (Denenberg, 1997)

There was no reason to doubt the truth of Mr. Oliver's or Ms. Joslyn's testimony or its significance. It helped form the basis for upholding the penalty of discharge. However, to give effect to the language of Article 33.4(1), the evidence must show more than proof of guilt or the appropriateness of a discharge penalty. In its own terms, it contemplates inquiry relevant to determining whether Grievant's employment *during the pendency of the instant proceedings* "...represents a potential danger to persons or property or would severely interfere with operations." Article 33.4(1).

While the cited rules and standards of conduct apply equally across all employees regardless of job title, the contractual propriety of a pre-hearing suspension for a particular job – here, a librarian – is not always self-evident.

Specific to this case, the evidentiary review includes whether it was necessary for inmates to have any physical access to the library during the pendency of the proceedings. Considering that Grievant clearly lacked the skill to make alterations to the local network (which explained his use of an inmate's skills to do so) and that his rights to use the system could be restricted or eliminated by his superiors, there are legitimate practical questions in the context of Article 33.4(1): Could Grievant have done basic library work, alone in the library, without risk of harm to himself or others? To what extent were existing security protocols – e.g. standard bag searches common to all employees and visitors - sufficient to protect the facility from an unacceptable risk of contraband being brought onto the property?

If more intense monitoring of Grievant would have been required to minimize any threat of misconduct during the pendency of these proceedings, what are the specifics, and do they rise to a level of severe interference with operations? Would such efforts nevertheless fail to protect against a potential danger to persons or property as contemplated by Article 33.4? Posed more generally, could the library's daily operations be restricted to non-inmates with the library's computers effectively secured so that Grievant could work alone with no interaction or communication with inmates, performing meaningful in-title work, while the disciplinary case made its way through the grievance procedure?

There was insufficient witness testimony or other evidence addressing these types of questions. In the instant case, without more specifics, the trier of fact is left to engage in a level of speculation that would operate to relieve the State of its negotiated burden to affirmatively

demonstrate how the Grievant's continued presence on the job poses a danger or would severely interfere with the State's operations.

Accordingly, based on a review of all the evidence adduced in the arbitration proceedings, the State has failed to meet its burden under Article 33.4(1). For the reasons explained, the Grievant is entitled to back pay for the period of his suspension without pay up to and including the date of issuance of the January 17, 2017 Opinion Award referenced herein.

AWARD – ISSUE 3

Issue 3: The State did not establish probable cause within the meaning of Article 33.4(1) to impose a pre-hearing suspension without pay on January 12, 2016. Grievant is entitled to full back pay and benefits from the first date of suspension through and including the date of the original Opinion and Award dated January 17, 2017. No other relief is due or warranted.

E. David Hyland
Impartial Arbitrator

State of New York)
) ss.:
County of New York)

I, E. David Hyland, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is my award.

Dated: April 26, 2018